

QUALITY COMMITTEE'S COMPREHENSIVE REPORT ON QUALITY CASEHANDLING

Joseph Barker, Regional Director, Region 13

Robert W. Chester, Regional Director, Region 6

Karen Fernbach, Regional Attorney, Region 2

Claude T. Harrell, Assistant to the Regional Director, Region 10

Rochelle Kentov, Regional Director, Region 12

Martha Kinard, Regional Director, Region 16

James G. Paulsen, Assistant General Counsel, Ops-Mgmt.

Leonard J. Perez, Deputy Officer-in-Charge, Subregion 33

Charles Posner, Deputy Assistant General Counsel, Ops-Mgmt.

Rosemary Pye, Regional Director, Region 1

Richard Wainstein, Supervisory Attorney, Region 4

Dorothy D. Wilson, Deputy Assistant General Counsel, Ops-Mgmt.

December 22, 2009

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INTRODUCTION

In February 2004, the General Counsel formed the Quality Committee to review issues involving the quality of casehandling work in the field. The Committee began by examining the FY 2003 quality reviews of the regions. That year, and each year since then, the Committee has issued two reports. One report focuses on common issues in field casehandling that were identified during the Quality Review process. The other report focuses on lessons learned from reviewing the litigation losses, and more recently some of the wins, during the fiscal year. This year, the Committee decided to consolidate the guidance from those 10 reports¹ into one document that would be easier to use for training and guidance. By clicking on the subject areas of the detailed table of contents, the viewer can move forward directly to the subject researched. We have added the discussion of the common issues identified in the FY 2008 quality reviews.

I. UNFAIR LABOR PRACTICE CASES

A. The Investigation – Overview

The investigation is the foundation of the case. A good investigation ensures the right decision is reached and, if litigation is necessary, that the evidence will have been properly developed. Both timeliness and quality are vital to a good investigation. Following the procedures discussed below will help to achieve those goals.

B. Preparation for the Investigation

1. Start the Investigation Promptly

Contact the charging party or its representative at the earliest possible date. This permits an early assessment of the case and saves time and reduces pressure on the Board agent and the parties in the later stages of the case. See [CHM 10052.3](#). It is recommended that the lead evidence, or at least the lead affidavit, be taken within 7 days from the filing of the charge in Category 3 cases, 14 days in Category 2 cases, and 21 days in Category 1 cases. For charges taken in person by an IO, it is recommended that the Region make efforts to take the affidavit of the charging party when the charge is filed, especially if the charging party resides some distance from the Regional Office or is not readily available, or the filing is a priority charge. If this is not possible, then the Information Officer should advise the charging party to contact the assigned agent by telephone or e-mail to promptly schedule an appointment for an affidavit in support of the charge. Board agents should inform their supervisors as soon

¹ The reports pertaining to the annual quality reviews are in [OM Memorandum 04-66](#), [OM Memorandum 05-57](#), [OM Memorandum 06-54](#), [GC Memorandum 07-06](#) and [GC Memorandum 08-06](#). The reports on litigation losses are in [OM Memorandum 05-38](#), [OM Memorandum 06-16](#), [OM Memorandum 06-91](#), [OM Memorandum 07-84](#), and [OM Memorandum 08-76](#).

as they obtain the lead evidence to assess the case. Where there are delays in obtaining evidence, appropriate action should be taken, such as sending a lack of cooperation deadline letter or, if the Board agent is unavailable, providing assistance or reassigning the case. Routine extensions of deadlines should be avoided, as the parties will learn to expect those in all cases.

2. Prepare the Parties for the Presentation of Evidence

Discuss with the charging party and its witnesses the evidence that will be needed to obtain detailed and accurate affidavits and the necessary documentary evidence. If the charge was taken by an Information Officer or there has been contact with an Information Officer, the Information Officer Contact Report should be placed in the file when the case is docketed to provide the investigating Board agent with preliminary information. Review prior and pending related cases for potentially valuable information. Although a charging party witness may not always have much documentary evidence, the Board agent should talk to the witness in advance to explore what aids to memory can be brought to the interview. Those aids might include union cards, union and employer literature, payroll statements, calendars, personal diaries, sign-in sheets for union meetings, written warnings, discharge letters, unemployment hearing tapes and correspondence, collective-bargaining agreements, and bargaining notes. The witness should be encouraged to check with friends, co-workers, and relatives who have objective evidence that may help refresh the witness' memory.

After the initial contact with the charging party, but before starting the taking of affidavits, contact the charged party to get a more comprehensive view of the case. Such early contact allows the Board agent to be sure that potential defenses will be explored in investigating the charging party's case, reducing the need for supplemental affidavits in the rebuttal stage of the case. Moreover, early contact with the charged party frequently leads to a prompt resolution of the charge, which is beneficial to all parties and the public interest.

3. Develop a Strategy for Completing the Investigation

Early contact with both sides provides an overview of the issues, establishes a relationship with the parties, and allows the Board agent to keep control of the timeliness and completeness of the presentation of witnesses and the submission of evidence. The Board agent will be able to develop a strategy for completion of the investigation, including the identification of specific allegations and issues; the theory of the case; areas of inquiry; areas of legal research; a list of witnesses to contact, including third-party witnesses, if appropriate; a list of documents to obtain; the identification of appropriate remedies, including consideration of 10(j) relief; and a schedule for completing these tasks. The charging party should be encouraged to present all named alleged discriminatees and corroborating witnesses to provide affidavits taken by a Board agent. The Board agent should not, however, limit the investigation of

the prima facie case to witnesses provided by the charging party, but should seek out any appropriate witnesses suggested by the evidence.

The Board agent should use these early contacts with both sides to solicit the critical documents, such as collective-bargaining agreements, discharge letters, and campaign material, and solicit preliminary position papers or, at minimum, oral statements of position. This information can identify necessary areas or research and lay the groundwork for sound affidavits. The Board agent can also start preparing a chronology of events that will help the accuracy of the case. It is also useful to keep a running checklist tailored to the specific case with: (1) general questions such as union activity, knowledge, animus, disparate treatment, and past practice to ask of all relevant witnesses; and (2) specific questions to ask corroborative witnesses.

C. The Affidavit

The affidavit is the “keystone” of the Agency’s work, and face-to-face interviews are the preferred method for securing affidavits. See [CHM 10054.2](#) and [CHM 10060](#). As such, it is imperative that affidavits be high-quality, thorough, probing, and comprehensive. To assist agents in preparing for and during the taking of affidavits, checklists have been developed to identify those details and elements needed in the most common 8(a)(1), 8(a)(3), 8(a)(5), and 8(b)(1)(A) cases. These checklists are intended as an aid to identify some key areas to cover in an affidavit and are *not* a comprehensive list of questions or issues. Other areas to include in the affidavit will be determined by legal research and by responses to the items in the checklist.²

1. Make Witness Interviews More Effective by Preparation, Open Questions, and Curiosity

Prior to beginning the affidavit, the Board agent should talk with the witness to get a sense of the witness’ story before recording the witness’ recollections. This overview will provide the framework for organizing the affidavit and identify areas that need to be developed.

In drafting the affidavit, the Board agent should exhibit a healthy sense of curiosity and skepticism to elicit necessary details, ask follow-up questions, fill gaps or identify when they cannot be filled, refresh memory, point out and attempt to explain inconsistencies, and assure that all elements of the allegations are covered. The Board agent’s questions are critical where a witness’ recitation of events is vague, confusing, improbable, or contains conflicting statements. Board agents must provide the foundation of evidence for all conversations and events -- asking when, where, who was present, how the event came about, and

² [Attachment B Checklist for 8\(a\)\(1\) Allegations](#)
[Attachment C Checklist for 8\(a\)\(3\) Allegations](#)
[Attachment D Checklist for 8\(a\)\(5\) Allegations](#)
[Attachment E Checklist for 8\(b\)\(1\)\(A\) Allegations](#)

what was said and by whom. Board agents must avoid the use of words, terms, and phrases that constitute unsupported legal conclusions. Examples are identifying an individual as a supervisor without substantive evidence that the individual possess at least one of the Section 2(11) indicia; making unsupported assertions or conclusions of cause and effect relationships; making unexplained links between actions and consequences that have no apparent connection; and using terms that carry specific legal conclusions without providing supporting explanations.

The affidavit will be crucial in evaluating the witness' credibility throughout the case, including its potential use in cross-examination. Former Chief Judge David Davidson's videotape on credibility divides the elements of credibility into truthfulness, accuracy of perception, accuracy of recollection, and accuracy of communication. Remembering these distinctions will reduce some of the sources of conflict in testimony and develop a more accurate account of the facts. Another source of advice on minimizing unwarranted credibility problems is [CHM 10064](#), which suggests drafting affidavits by asking questions in plain language, asking for detail, counseling against giving opinions or conclusions, and re-interviewing witnesses to resolve conflicts.

Before asking a witness to review and sign a draft affidavit, or before mailing an affidavit to the affiant, Board agents should read the entire affidavit for clarity and completeness. A thorough, clear affidavit will avoid the need for supplemental affidavits and aid the witness' credibility throughout the case.³

2. Document the Interview

a. Relevant Conduct by the Affiant and Other Credibility Considerations

Investigating Board agents should document in the case file relevant conduct by the affiant. If credibility concerns arise either because of the way the affiant behaves in giving the affidavit or because the affiant seems to act consistently with what the affiant has been accused of by the opposing party, the Board agent should record these observations in the file and the comments should be raised at the agenda and mentioned in the decisional document. A Region should proceed to hearing if it is unable to resolve the credibility question administratively. However, a Region should not prosecute a case of someone who is knowingly lying. Similarly, conduct by charged party witnesses or neutral witnesses that enhances or undermines the charging party's credibility should be noted in the agenda and in the decisional documents. The Region should also consider the impact of determinations about a witness' credibility in prior NLRB proceedings.

³ See [OM Memorandum 06-16](#) in which the Quality Committee suggested ways to take effective affidavits and [Training Module 19](#).

The original investigation is critical in building the case or screening out cases that are not winnable. Agency policy is to prosecute credibility cases unless compelling contrary documentary evidence or an objective analysis of the totality of the evidence warrants dismissal. [CHM 10064](#) suggests using techniques such as getting third-party evidence and using investigative subpoenas.

A memorandum issued by then General Counsel John S. Irving on March 5, 1976, setting forth his policy on investigating credibility issues continues to reflect Agency policy.

b. Contact Information

Regions are required to communicate with alleged discriminatees at the time complaint issues to advise them of their responsibilities to seek interim employment, to keep records of interim earnings, and to inform the Regional Office of any change of address. See CHM [10506.3](#), [10508.8](#), and [10550.2](#). In [OM Memorandum 04-16](#), Regions were instructed to collect social security numbers from discriminatees and were advised of procedures to protect the privacy of that information. In [OM Memorandum 07-34](#), the Backpay Claimant Identification form was revised, in part, to include a privacy statement concerning the solicitation of social security numbers. Because of privacy considerations, social security numbers should not be included in an affidavit. Rather, they should be recorded in a separate file memo, which may also be used to record other contact information. [CHM 10052.12](#) and [10054.2\(b\)](#). The revised Backpay Claimant Identification form may be used for this purpose. [OM 07-34](#). The sole reason for obtaining a social security number is to use it to identify individuals in searches using ChoicePoint or other online resources. A discriminatee's refusal to provide a social security number should not be considered a refusal to cooperate in the unfair labor practice investigation.

3. Use of Telephone Affidavits

a. Circumstances Warranting Telephone Affidavits

Agency policy on the use of telephone affidavits is set forth in [OM Memorandum 99-75](#) and [CHM 10060.10](#). In the absence of significant budgetary issues, there will be a presumption in favor of face-to-face affidavits in all Category 2 and 3 investigations, although the Regional Director retains discretion to use telephone affidavits in certain limited Category 2 cases. See, [GC Memorandum 02-02](#). In Category 1 cases, where the issues are generally more straightforward, [OM 99-75](#) provides that the use of telephone affidavits is generally appropriate, but that the Regional Director may exercise discretion in evaluating whether special circumstances warrant the use of face-to-face affidavits.

b. Procedural Issues with Telephone Affidavits

Telephone affidavits are no different from face-to-face affidavits, and, accordingly, they should also be captioned “Confidential Witness Affidavit.” Telephone affidavits do present procedural considerations substantively different from the face-to-face affidavit interview. The best practice is to prepare the affidavit during the initial telephone conversation, which will be more accurate than trying to prepare an affidavit from notes taken during the telephone conversation. When prepared during the initial conversation, the affidavit can be read to and reviewed with the affiant, thereby securing immediate feedback on accuracy, inadvertent omissions, or necessary modifications.

At the time the telephone affidavit is prepared, the Board agent should inform the affiant that, upon receipt of the affidavit, the affiant should contact the Board agent. This should be reaffirmed in any cover letter accompanying the affidavit. Upon that second contact, the Board agent should ask the affiant if the affidavit has been read, reviewed, and/or modified. Prior to soliciting the affiant to sign the affidavit, the Board agent should administer the oath by saying, “Do you solemnly swear/affirm that the affidavit you have just given is the truth, the whole truth and nothing but the truth, so help you God?” After an affirmative response, the Board agent should instruct the affiant to sign the affidavit.

There are a few procedural details that need to be adapted for telephone affidavits. The county and state should be those of the location of the affiant. The language of the jurat used in connection with the taking of a telephone affidavit should reflect that the affidavit has been taken and sworn by telephone. The jurat language should appear as “Subscribed and Sworn to before the Board Agent by Telephone on (date),” followed by the signature line and the Board agent’s name.

D. Complete and Quality Investigation

A quality investigation requires oversight and intensive participation by the supervisor. The supervisor will ensure that appropriate documentary evidence is obtained, that corroborative evidence is sought and obtained, that investigative subpoenas are used as necessary, and that probing techniques are utilized so that good decisions are made in each case.

Responsibility for sound determinations and for quality work in all phases of casehandling is shared by the entire Regional Office staff, but first-line supervisors have a critical role in assuring that procedures and policies are fully followed and that the highest standards are maintained.

The first-line supervisor occupies a unique position, providing immediate review of the investigation as a case is prepared for presentation to Regional Office decision makers. It is, therefore, imperative that supervisors thoroughly review affidavits and other investigative materials during the investigation and engage in early and regular discussions with investigating agents regarding the

status of each case and what is required to complete the investigation. It should be a rare exception when the supervisor has not read the file prior to a Regional determination of the case. The supervisor is also in the best position to assure the quality of many critical aspects of casehandling. For example, the supervisor can confirm that established policies are followed, such as timely initiation of the investigation or the use of proper EAJA language in correspondence soliciting the charged party's response. The supervisor should note problems in affidavits or identify overlooked issues. The supervisor also assures that all facts presented in the Final Investigation Report or other document used for making a Regional determination are fully supported by affidavits or other evidence.

1. Obtaining Documentary Evidence

Documents are often the most persuasive form of evidence. If documents exist that would corroborate key portions of a charging party's allegations, it is inherently risky to determine the merits of a case without first having obtained and analyzed those documents.

A common example is when an authorization card will verify an employee's union activity and substantiate the date the employee engaged in such activity. A less common example is when phone, fax, or e-mail records may verify or undermine the existence or timing of a critical phone call or communication. Making a determination on the merits of a case without first obtaining these documents creates a high risk of problems at trial or reversal on appeal of a dismissal.

2. Obtaining Corroborative Testimony or Evidence

Corroboration of statements or events necessary to establish or rebut a prima facie case, disparate treatment, or a respondent's *Wright Line* defense, has always been and remains the linchpin for the successful investigation. Assertions by one witness about a statement or event, when contradicted by one or more witnesses of the opposing party, can lead to losses on credibility grounds during litigation unless there is solid evidence elsewhere in the record supporting the witness' version of what was said or done.

During the investigation, a running list should be maintained of specific questions to ask potential witnesses for corroboration or rebuttal. Although a charging party is expected to provide witnesses within its control, it remains the investigating agent's responsibility to thoroughly investigate a case and no stone should be left unturned. Consequently, the investigating agent must be industrious and creative in obtaining corroborative evidence. Many excellent investigative techniques exist that should be utilized. Addresses of potential witnesses may be obtained from *Excelsior* lists, prior case files, authorization cards, ChoicePoint (if a social security number is available), or perhaps through a "Yahoo People Search" or other social networking sites if it is generally known where a witness lives. If the witness' telephone number is known, addresses may be obtained using a reverse search on Yahoo or similar address search

service available on the internet. If those efforts fail, the Region could request a list of the names and addresses of all of the employer's employees or a labor organization's members in the relevant classification, department, shift, or facility. Remember that a broader grouping should be requested rather than specific names in order to protect the identity of potential witnesses.

After the address and telephone number of an employee witness is obtained, the investigating agent should attempt to meet with the employee face-to-face rather than speak to him or her over the phone. Witnesses are generally much less likely to refuse to give an affidavit if they are face-to-face with an agent than if they are contacted by telephone. Unannounced visits are encouraged if the evidence is considered crucial to a case. Making a few calls and getting no response is simply not enough. If corroboration is available but is not being provided voluntarily, investigative subpoenas should be considered. Corroborative evidence usually should be in the form of an affidavit, rather than a file memorandum or confirming letter, to lessen the chance that a witness' testimony will change at trial.

Generally, versions of events vary because of different perceptions and memories, not just fabrications. Consequently, it is useful to get as many witnesses as possible to provide an accurate picture of events. When taking evidence about group meetings, the Board agent should speak to each witness separately. Witnesses are unlikely to all say the same thing, but there should be at least two or more corroborating witnesses. If a key witness is reluctant to testify, the Board agent may be successful in obtaining an affidavit by making an unannounced personal visit, at which time the witness can be given information about the process of the investigation.⁴ Language problems often raise a special need for corroborating witnesses.

In seeking corroboration, agents should avoid relying exclusively on the charging party to determine which witnesses should be contacted. An assessment by the charging party as to which witnesses are likely to cooperate is often incorrect. Agents may find that a witness the charging party thought would "spill the beans" may experience amnesia, whereas someone perceived as biased may give an honest and candid account. This includes employees who may be perceived to be hostile to the charging party or whose interests are aligned with the charged party, such as an anti-union employee. If the employees of a certain department or facility were present during a conversation or speech but their names or ways to contact them are unknown, then personnel files, payroll lists, or authorization cards should be obtained and used to contact these employees.

While testimony of neutral witnesses and documentary evidence are the most desired forms of corroboration, corroboration may also be obtained

⁴ See [CHM 10054.3\(b\)](#) on reluctant third-party witnesses.

indirectly. If a direct witness to a conversation or event is not available, indirect corroboration may be obtained through a witness who had a similar conversation or experience. Contemporaneous statements to spouses or others, a contemporaneous recording of events in a journal or diary, long distance or cell phone records, or tying the timing of a statement or action to a fixed or known event such as a birthday or holiday, may also serve to substantiate a witness' testimony. If respondent attempts to impeach the credibility of a General Counsel witness, counsel for the General Counsel may attempt to rehabilitate the witness by using a prior consistent statement of the witness.

In summary, experience demonstrates that efforts to obtain corroboration during an investigation, both positive and negative, will materially aid Regions in determining the merits of a charge.

3. Using Investigative Subpoenas ad Testificandum and Duces Tecum

If the Region cannot get cooperation during an investigation, it should consider investigative subpoenas, both ad testificandum and duces tecum, if the evidence is crucial to making an informed determination. Consider using subpoenas ad testificandum for corroborating witnesses, third parties, and charged party's witnesses. While Regions tend to be reluctant to subpoena charged party's witnesses for testimony, it may be necessary if the charged party asserts that there is no documentation for its decision. Per [GC Memorandum 00-02](#), the General Counsel delegated increased authority to Regional Directors to issue investigative subpoenas, including, in appropriate circumstances, the ability to subpoena documents and testimony from charged parties. If the defense seems logical and cannot be rebutted, the Region may decide to dismiss.

Regions may hesitate to use investigatory subpoenas because of the potential for delay. However, Regions should seek enforcement of subpoenas if there has been a refusal to comply and the Region believes either that the case cannot be decided without the testimony or if the prima facie case is weak as compared to the respondent's defense and the risk of proceeding without these potential witnesses outweighs the delay in obtaining subpoena enforcement. See [GC Memorandum 00-02](#).

4. Using Probing Techniques

Using probing techniques during the investigation will assist in making a sound determination by uncovering lines of inquiry and relevant documents and by identifying potential witnesses, such as individuals who may help establish disparate treatment. In taking affidavits or conducting interviews of charged party witnesses, the Board agent should start by establishing all the reasons for the adverse action and then examining each of the reasons. The affidavit should expressly state that these are the only reasons for the adverse action. Later, the agenda minute or other decisional document should specify and fully analyze each of the proffered reasons for the adverse action.

Three important caveats apply to using probing techniques in investigations:

1) Because the Board agent is conducting a neutral investigation, the rigor of the questioning should not be accompanied by any adversarial demeanor or conduct. Information is always more readily obtained when the investigator instills confidence in the objectivity and professionalism of the interviewer.

2) A Board agent should never conduct group interviews, which will taint the reliability of the affidavit or interview and undermine witness credibility.

3) To avoid the appearance of bias, the agent should emphasize obtaining all the reasons for the adverse action, rather than suggesting that any reason is pretextual. The validity of the reasons should be examined through objective questions, documents, and other witnesses.

5. Maintaining the Appearance of Neutrality

The actions of Board agents should not give rise to questions of their neutrality. Actual neutrality in dealing with parties and gathering and considering their evidence is not sufficient. Rather, the appearance of that neutrality must be conveyed in all contacts with the public if we are to ensure confidence in the integrity and fairness of our processes. Those appearing before us must be assured that the Agency is a forum that is committed to an objective, unbiased assessment of their positions and evidence.

The appearance of neutrality must be reflected in all communication with the parties, whether written, telephonic, or face-to-face. Discussions with parties that are brusque or accusatory present the appearance of predisposition or bias, either of which is inimical to obtaining parties' cooperation and securing all relevant evidence.

Likewise, a request for a party's evidence that imposes an unreasonably short deadline conveys not only a lack of impartiality and desire for a complete response, but raises due process considerations as to whether the party is being afforded a meaningful opportunity to respond to and rebut allegations lodged against it. Techniques to avoid unusually short deadlines include: contacting the charged party early; getting necessary documentary evidence early; and requesting evidence, particularly documentary evidence, as the investigation progresses rather than waiting for the last shred of evidence from the charging party to request evidence from the charged party. If necessary, request an additional item from the charged party and extend the deadline a day or two as appropriate and necessary for that additional item. Similarly, an investigative subpoena should not be sent to a party until the party has refused or declined to produce the document pursuant to a written request to provide the information within a reasonable period of time.

Face-to-face communications perhaps pose the greatest potential for demonstrating an appearance of bias. Board agents should maintain a sense of decorum, avoiding at all times a confrontational, argumentative, judgmental, or aggressive style that conveys an appearance of bias. Similarly, Board agents must also avoid overly friendly conduct that suggests alignment with one party over another.

A healthy sense of curiosity and some skepticism when obtaining evidence from a party or witness will contribute to a complete factual picture in an unfair labor practice investigation. However, that skepticism must not take the form of cynicism or expressions of outright disbelief. A balance must be struck between probative questions about seemingly conflicting or inconsistent accounts and questions that suggest judgmental assessments of those accounts. While a Board agent is encouraged to probe equivocal or generalized testimony, that probing must not assume an adversarial aura by being hostile, argumentative, or accusatory.

E. Obtaining Charged Party Evidence

1. Initial Contact and Deadlines

The charged party should not be given an unreasonably short deadline to respond to the issues raised by the charge and to submit evidence. Instances like these may give the public the false impression that we are favoring one side, that we do not hold ourselves to high standards of due process, or that we are not concerned with processing our cases in an expeditious, high quality manner. Impact Analysis establishes time goals for completion of our cases. However, regardless of the time goals set by Impact Analysis or whether a case is considered overage under Impact Analysis, investigations must afford the parties a fair and reasonable opportunity to present evidence.

Under [CHM 10052.5](#), contact with the charging party is to be made at the earliest possible date consistent with other casehandling priorities. When early contact is made, sufficient details regarding the charged party's position can be sought to enable the Board agent to examine the charging party regarding the charged party's position. Early contact with both the charging party and charged party allows the Board agent to develop a strategy for completion of the investigation, including the identification of specific allegations and issues, the theory of the case, areas of inquiry, areas of legal research, a list of witnesses to contact, including third-party witnesses if appropriate, a list of documents to obtain, approaches to reluctant witnesses, appropriate remedies, including consideration of 10(j) relief, and a schedule for completing these tasks.

2. Requesting Affidavit Evidence from a Charged Party

In accordance with [CHM 10054.4](#) and [10054.5](#), if consideration of the charging party's evidence and the preliminary information from the appropriate charged party representative suggests a prima facie case, the charged party should be requested to provide affidavit evidence and relevant documentary

evidence by a specific date. Such evidence may be crucial to making a determination on the merits of a charge. Furthermore, for EAJA purposes, the Board agent's letter seeking the charged party's cooperation in providing affidavits must specifically explain that the refusal to allow the Board agent to obtain affidavits from charged party witnesses would constitute less than full cooperation in the investigation. Although many Regions set forth the requirements for full cooperation in their opening docket letter to the parties, such letters are not sufficient by themselves to document noncooperation.

[OM Memorandum 06-54](#) recommended that Regions utilize sample letters and attached four letters that Regions may utilize to ensure that EAJA letters contain appropriate language. Regions should make templates containing appropriate EAJA language available to all Board agents. CATS templates of these letters, together with step by step instructions for making the templates available, are posted on the Operations Page on the Surfboard by clicking the "Guidance/Training," Quality Committee Materials, and "[EAJA Letter Templates](#)."

3. Importance of Documentation (Contact with Charged Party and Commerce Information) in the File

Equally important to requesting affidavit evidence from the charged party, is providing documentation in the file of important items such as:

- (a) the charged party's failure to cooperate in the investigation;
- (b) contacts with parties regarding presenting witnesses or responding to certain evidence from another party;
- (c) notes or contact sheets showing progress of the investigation;
- (d) commerce information;
- (e) cross-references to related cases; and
- (f) signed telephone affidavits.

Commerce information must be obtained in every investigation and the source of information for establishing sufficient commerce to warrant the Board's assertion of jurisdiction must be set forth in the case file. Upon initial contact with an employer or its counsel, agents should ask the party to either complete the form and fax it to the Board agent or fax a letter conceding commerce including facts to support the conclusion. Appropriate follow-up should be made in the event the information is not promptly received.

In merit cases, substantiation of the commerce information is critical. Decisional documents, such as agenda minutes and investigative reports, should clearly specify whether the charged party meets the Board's commerce requirements for jurisdiction and the source of that information. In no case should a complaint issue without the source of commerce being documented.

4. Board Agent Letters Should Not Disclose Confidential Information

Although Board agent letters to the charged party should seek affidavit and documentary evidence, the Board agent should be careful not to provide the charged party with more information than is necessary or desirable regarding the merits of the allegations and the nature of the evidence in the investigative file. In this regard, letters to charged parties should not contain a detailed recitation or precise quotation of a potentially violative statement or key conversation. Similar to complaint allegations, the letters should provide:

- (a) a general description of the statement, such as interrogation of an employee about the employee's union activities;
- (b) the name of the supervisor or agent who made the statement;
- (c) the approximate date the statement was made; and
- (d) the location of the conversation, such as at the plant, in a restaurant, or by telephone.

In certain cases, such as discharge and bargaining cases, it may be appropriate to disclose additional information that will ensure a complete investigation of all the issues, while protecting the confidentiality of the witnesses. If the charged party provides Board-administered affidavits, more specific information might be revealed when the affidavits are taken, but only if the confidentiality of witnesses can still be protected. See [CHM 10054.4](#). Since the identity of a witness should be protected, the Board agent should, whenever possible, avoid providing details that would likely disclose the identity of the witness.

To ensure that letters to charged parties contain the appropriate statements regarding Board-administered affidavits and do not provide too much detail regarding the investigation, Regions should take steps to ensure there is adequate supervisory review of the letters, especially those being sent by newer Board agents.

5. Interviewing Witnesses of a Charged Party Who Refuses to Allow Board Affidavits

The best evidence in an investigation is face-to-face sworn affidavits from witnesses, including witnesses offered by the charged party. [CHM 10054.5](#). Rather than permitting sworn testimony, from time to time a charged party may offer interviews of their witnesses without permitting the testimony to be reduced to an affidavit. Currently, there are different practices in the Regions regarding whether to conduct unsworn interviews of charged party witnesses.

To improve the overall quality of investigations and in order to anticipate potential defenses by a charged party, Regions should consider conducting face-to-face interviews of witnesses that a charged party is willing to make available in lieu of sworn affidavits. Charged parties should always be encouraged to provide

sworn affidavits to a Board agent. However, because we want “to know it all,” the Region should avail itself of the opportunity to interview the charged party’s witnesses if either offered by the charged party in lieu of affidavits or at the request of the Region after affidavits have been refused.

Regional Directors retain the discretion to decide under what circumstances, if any, they will allow for such interviews. However, such interviews often provide much more information and detail than position statements or unexplained documentary evidence. Although interviews will not be provided the same weight as sworn testimony, they do provide insight into potential charged party defenses. Such interviews also allow the Board agent to explore and evaluate any defenses raised by the charged party and an opportunity to assess the persuasiveness of potential witnesses. If documents are provided by the charged party, face-to-face discussion with witnesses, even though not sworn testimony, may provide substantial insight into those documents.

Board agents are encouraged to make detailed notes of such witness interviews that may be referred to in final investigation reports/agenda outlines and discussed during agenda meetings. Although not adopted by the witnesses, Board agent notes have nevertheless proven beneficial to trial attorneys for cross-examination purposes if litigation is necessary. Further, such interviews may prompt the Region to issue investigative subpoenas to a charged party if sworn testimony is necessary to reach a decision on the merits of the case.

Board agents must be wary of experienced or difficult counsel who may attempt to limit evidence provided by their witnesses but seek detailed information about the case from the Board agent. The ultimate question to be decided is, of course, whether taking the evidence through an interview would assist the decision-making in the investigation. If a charged party has been permitted a reasonable deadline to provide evidence but requests additional time after the deadline to provide interviews, the Region must determine whether, in its judgment, the delay in completing the investigation will be offset by the value of obtaining the more detailed evidence from the interviews.

Because the potential benefits from interviews outweigh the outright rejection of this investigative technique, Regions are encouraged to exercise their discretion to utilize this technique in appropriate circumstances.

F. Analyzing the Evidence

1. Make Sure the Story Is Complete, Consistent, Coherent, and Believable

It is critical to be inquisitive during the process of obtaining the evidence and to probe to get the entire story. The investigating agent must develop the context of the events in question by asking probing questions to assess the inherent probabilities. Facts developed through probing witnesses may lead to

discrediting one side or the other. If the conduct or statement discovered during the investigation is ambiguous, probing into the surrounding circumstances will often help clarify the situation. It is important for the investigating agent, as well as the Regional decision makers, to “take a step back” to objectively analyze the context, totality, and overall probability of the objective evidence and to decide whether critical facts are missing. Like the story of the blind men who are asked to describe an elephant after each person touches a different part of the elephant’s body, reality is viewed differently depending upon one’s perspective and the piece of the story one sees. Once the other pieces are added, the overall picture can be quite different.⁵

2. Consider the Context of the Case

When making the Regional determination, the Region should consider the context in which the alleged violations occurred. In investigating and developing the story (the facts of the case), the context in which the alleged violations occurred often provides either important clues about potential pitfalls and issues or bolsters other evidence supporting a determination of a violation. For example, the Region should carefully consider witness credibility where the evidence of animus or protected activity is remote in time. If the case is narrowly focused and seems to turn on credibility, the Board agent should try to see if other conduct by the witnesses sheds light on their credibility. The conduct or statement in dispute may be either ambiguous or incredible. If the conduct or statement is ambiguous, the surrounding circumstances may clarify the meaning. In assessing credibility, if, for example, a witness testifies that he or she made certain statements or was the target of a threat, the witness’ conduct and statements before and after the conversation may make the disputed testimony more or less plausible. The Region should examine the big picture and assess the inherent probabilities. Although the improbable does sometimes happen, the Board agent should develop the context of the events in question and remain suitably skeptical of a highly improbable theory of violation.

If potential 8(a)(3) discrimination occurs during an organizing campaign, whether the employer campaigned against union representation is important. If the employer was aware of the union campaign, made no unlawful statements, and did not communicate its opposition to the union, establishing 8(a)(3) discrimination will be difficult in the absence of a convincing explanation why the employer did not outwardly oppose the union when it could have done so.

When allegations of independent 8(a)(1) or 8(a)(3) discrimination arise in a context where a union currently represents employees, the relationship between the union and the employer is relevant. The Board agent should specifically inquire about the nature of that relationship and probe for specifics to support whatever answer is provided by a witness. If that relationship is

⁵ See [OM 07-84](#) Section E and [OM 06-16](#) Section C.

generally good, the agent should ask if there has been a specific event such as a work stoppage or hostile contract negotiations that has created a conflict. In addition, the agent should ask if the supervisor or agent who engaged in the alleged 8(a)(1) conduct or was involved in the discrimination has expressed animus toward the union or a particular union official.

If the employer and a particular supervisor have a history of processing grievances with minimal animosity, a claim of an 8(a)(1) threat for filing a grievance should be met with questions about why this grievance is different from others and what may have prompted the change in tenor. If the overall relationship with a union is good and it cannot be established that a particular individual has animus, proving 8(a)(3) motivation, an essential element of a violation, will be difficult. Where discipline seems overly harsh or inexplicable, it may be tempting to assume that the reason must be union animus when there are factors that contradict that assumption. In fully developing the context, consider the nature of the relationship and understand how that relationship either helps prove or disprove the alleged discrimination.

Although the answers to these questions alone will not determine whether a violation is found, they are likely to help the Region accurately assess the situation and appreciate the strengths and weaknesses of the case. In other words, just because the employer generally has a good relationship with the union does not mean that the Region should not proceed on an 8(a)(1) statement or a claim of 8(a)(3) discrimination. However, the Region needs to know that fact before issuing complaint and should be prepared to address this issue at trial.

3. Circumstances that Warrant Special Consideration

Some circumstances warrant special consideration when a Region is deciding whether further proceedings are warranted. The Region should pay particular attention to the issue of motive if a personal or romantic relationship exists, a probationary employee is involved in the alleged discrimination, or where critical evidence is omitted in a document about the events in dispute.

a. Carefully Analyze Motive Cases, Especially If There Is a Personal or Romantic Relationship that Impacts on the Situation

Evidence of animus is part of the prima facie case and is more difficult to establish when there is a history of personal animosity that may have developed as a result of a past personal or romantic relationship. For example, when a manager and an employee/discriminatee formerly had a romantic relationship, this fact may shed light on the conduct that is the subject of the investigation and may impact the discriminatee's credibility. When there is a personal or romantic relationship between the parties involved, a Region must take an especially close look at the evidence. The focus on the relationship should not serve as a distraction to the investigation. In all instances, it is important to attempt to

uncover independent evidence of animus resulting from union or protected, concerted activity in order to establish the elements of a violation.

b. Scrutinize the Evidence Carefully in Cases Involving Probationary Employees

Discrimination against probationary employees is likely to be harder to prove because employers typically have less documentation and often discharge employees with less “cause,” making it easier for employers to meet their *Wright Line* burden. If there is an existing collective-bargaining agreement, a longstanding relationship with the union, no animus, and insufficient evidence of disparate treatment among probationary employees, the mere fact that few or no probationary employees have been fired in the past is not sufficient to show disparate treatment. Instead, the investigation must establish that the employer condoned the same or like behavior in the past.

c. Carefully Consider Witness Credibility When Critical Evidence Is Omitted in a Document about the Events in Dispute

Omission of an 8(a)(1) statement or other critical evidence from a document or testimony provided to another agency, such as the EEOC or an unemployment agency, can negatively impact a witness’ credibility. Accordingly, the Board agent should ask the witness if he or she previously has provided documents or testimony about the events being testified to and, if so, obtain a copy of those documents. If there are omissions or variances from the affidavit testimony, it is important to ask the witness to explain those differences and carefully examine the responses. Similarly, if a witness provides an account to the union that varies from the witness’ affidavit, the differences should be explored. Differences or variations do not necessarily mean that a Region should not proceed, but the Region must be aware of those differences prior to issuing complaint and assess the impact those variances may have on the case.

G. Legal Analysis

1. *Wright Line*

a. Present Persuasive Evidence that Establishes the General Counsel’s Initial Wright Line Burden

Sometimes the General Counsel has difficulty satisfying its [*Wright Line*](#)⁶ burden at trial. The Board’s *Wright Line* standard applies to union and concerted protected activity discrimination. It applies to pretext cases, where the employer’s proffered legitimate explanation is without merit, and to mixed motive

⁶ 251 NLRB 1083 (1980), enfd. on other grounds, 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

cases, where the employer's proffered legitimate explanation for the adverse personnel action has at least some merit.⁷

To establish that an employer's adverse action has violated the Act, *Wright Line* requires the General Counsel to first prove by a preponderance of the evidence that the employee's protected activities were a motivating factor in the employer's decision to take the adverse employment action. Once that is established, the burden of persuasion shifts to the employer to prove that it would have taken the same adverse action even in the absence of the protected activities.⁸ The overall burden of persuasion in a *Wright Line* case remains with the General Counsel.⁹ Accordingly, the General Counsel should ordinarily include all its evidence in its case-in-chief rather than holding back evidence for cross-examination or rebuttal and should not assume that proof of knowledge, animus, and timing will suffice to shift the burden to the respondent.

As explained in [GC Memorandum 06-09](#), to meet this burden of persuasion, the General Counsel must establish that:

- (1) the alleged discriminatee engaged in protected activity;
- (2) the employer had knowledge of that activity; and
- (3) the employer carried out the adverse employment action because of the employee's protected activity – i.e. a discriminatory motive. Evidence of a discriminatory motive may include:
 - (a) the timing of the adverse action in relationship to the employee's protected activity;
 - (b) other unfair labor practices, statements and actions showing the employer's anti-union sentiment; and
 - (c) evidence demonstrating that the employer's proffered explanation for the adverse action is a pretext. Evidence of pretext can include:
 - (i) *disparate treatment* of the alleged discriminatee,¹⁰
 - (ii) *departure from past practice* when imposing the adverse action,¹¹

⁷ 251 NLRB at 1089 n. 13.

⁸ 251 NLRB at 1089.

⁹ See [GC Memorandum 06-09](#), citing *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276-278 (1994).

¹⁰ See, e.g., *NLRB v. ADCO Electric, Inc.*, 6 F.3d 1110, 1119 (5th Cir. 1993) (employer discharged only union supporter for failing to report for overtime duties); [Regal Recycling, Inc.](#), 329 NLRB 355, 356-357 (1999) (employer required only supporters of disfavored union to produce immigration documents); [Naomi Knitting Plant](#), 328 NLRB 1279, 1283 (1999) (employer disciplined only open union supporter for same conduct engaged in by two other employees).

¹¹ See, e.g., *Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 814 (3d Cir. 1986), cert. denied 481 U.S. 1069 (1987); *Birch Run Welding & Fabricating, Inc. v. NLRB*, 761 F.2d 1175, 1181 (6th Cir.

- (iii) providing *shifting explanations* for the adverse action,¹²
- (iv) *failure to investigate* whether the alleged discriminatee engaged in the alleged misconduct justifying the adverse action,¹³ or
- (v) proffering a non-discriminatory *explanation that is not true*.¹⁴

The following guidelines can assist in meeting the *Wright Line* burden: (1) thorough analysis of timing; (2) more emphasis on establishing animus; and (3) greater use of pretext evidence.

(1) Thorough Analysis of Timing

Timing is an important element of proving a discriminatory motive. Just because the adverse action occurs after the protected conduct, however, does not establish that the protected activity was a motivating factor. The investigator needs to thoroughly analyze timing in the investigation and decisional document, and the General Counsel must also focus on this factor at trial. The investigator should determine what factors explain the timing of the adverse action, both in relation to the alleged misconduct and to the protected conduct. Factors that might be considered include the time between the protected conduct and the discipline; whether there was a significant or unexplained delay between the alleged misconduct and the discipline; whether the time between the alleged misconduct and the discipline was sooner or later than usual; and whether there was an investigation of the conduct.

When animus is remote in time or the union's campaign has ended, the strength of the prima facie case must be carefully evaluated. If the 8(a)(3) discharge or other discrimination occurs after a union campaign or animus is remote in time, the Region should gather other evidence to establish the prima facie case, such as evidence of concrete instances of disparate treatment. The Region should take a hard look at how nexus to the protected activity can be established. The investigator should look for specific evidence of animus by the decision maker or about the discriminatee, rather than general evidence of unrelated animus. The investigator should also look to see if there is a new, proximate reason for discrimination, such as the end of the certification year or

1985); [JAMCO](#), 294 NLRB 896, 905 (1989), *affd.* mem. 927 F.2d 614 (11th Cir.), cert. denied 502 U.S. 814 (1991).

¹² See, e.g., *Abbey's Transportation Services, Inc. v. NLRB*, 837 F.2d 575, 581 (2d Cir. 1988); *Royal Development Co. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983); [Seminole Fire Protection](#), 306 NLRB 590, 592 (1992).

¹³ See, e.g., *W. W. Grainger, Inc. v. NLRB*, 582 F.2d 1118, 1121 (7th Cir. 1978).

¹⁴ See, e.g., [Cincinnati Truck Center](#), 315 NLRB 554, 556-557 (1994), *enfd.* sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997) (unpublished table decision); [Active Transportation](#), 296 NLRB 431, fn. 7 and fn. 8 (1989).

protected concerted activity that can be shown to be known by the employer. Strong animus may counter a lapse of time between the protected conduct and the adverse action. It may also be possible to point to continued animus, protected activity, or the prospect of renewed protected activity to explain any apparent gaps in timing. In all cases, timing must be fully addressed.

Because timing is a strong indicator of motivation, it is extremely useful to use a chronology in the investigation. It is also helpful to keep that chronology in mind in trial preparation, the opening statement, and the brief. A chronology helps to highlight the cause and effect between the protected activity and the adverse action.

(2) Emphasis on Establishing Animus in Section 8(a)(1) Discrimination Cases

While establishing union animus is rarely overlooked in a Section 8(a)(3) discrimination case, it is more common to find a lack of recognition of the need in a Section 8(a)(1) discrimination case for some showing of animus towards the concerted protected activity to link the activity and the adverse action. The analysis is much the same as with union activity. If there is no direct evidence through employer statements, there may be evidence of disparate treatment. For example, the employer's treatment of the discriminatees may have abruptly changed after the concerted protected activity in large and small ways, from denying employees overtime, loans or good assignments, to hostile treatment on a personal level.

(3) Use of Pretext Evidence to Establish Unlawful Motive

A well-established and persuasive analysis for using pretext to help prove discriminatory motivation is found in *Shattuck Denn Mining Corp. v. NLRB*,¹⁵ which was specifically approved in *Wright Line*.¹⁶ In describing the reliability of pretext as an indicator of discriminatory motive, the Court held:

If [the trier of fact] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal – an unlawful motive – at least where, as in this case, the surrounding facts tend to reinforce that inference.¹⁷

¹⁵ 362 F. 2d 466 (9th Cir. 1966).

¹⁶ *Wright Line*, 251 NLRB at 1088 n. 12 (The absence of any legitimate basis for an action, of course, may form part of the proof of the General Counsel's case, citing *Shattuck Denn*).

¹⁷ *Id.* at 470.

The *Shattuck Denn* formula is basically strong activity, strong timing, and strong pretext, which, if not rebutted, will establish a violation.¹⁸

b. The Careful Analysis of Discrimination Allegations When Multiple Employees Are Involved

Sometimes there are problems when multiple employees are involved in conduct that led to discipline for employees who engaged in union or protected activity.¹⁹ This includes situations where union adherents are disciplined and other employees are not disciplined or are not disciplined as severely as union supporters. It also includes situations where union supporters and non-supporters were similarly disciplined but counsel for the General Counsel argues that those who were not union adherents were “caught up” in the employer’s effort to discipline the union adherents.

Like all other 8(a)(1), (3), or (4) discipline, these situations require a careful analysis. Particular attention must be paid to the evidence regarding both the union supporters and the non-union supporters. Counsel for the General Counsel must establish (1) that the discriminatees engaged in union or other protected activity; (2) the respondent’s knowledge of that activity; and (3) evidence that antiunion or Section 7 animus was a substantial or motivating factor in the employer’s adverse employment action. Counsel for the General Counsel must also address these elements with regard to the other employees involved in the same conduct.

Where multiple employees engaged in arguably similar conduct for which some discipline was issued, the Board agent must determine which of those employees engaged in union or other protected activity and, equally importantly, which employees did not engage in that activity or engaged in anti-union activity or opposed the protected activity. The Board agent must uncover in detail what that activity was and when it occurred. Then the Board agent must determine whether employer knowledge can be established as to both those who engaged in union or protected activity and those who opposed or did not engage in that activity.

With regard to the causal nexus between the discipline and the protected activity, if non-union adherents were not disciplined or were disciplined less harshly, the Board agent must be certain that their misconduct was sufficiently similar to that of the union adherents and that the employer cannot provide a persuasive explanation for the differing treatment. If the Region does not have sufficient evidence regarding the misconduct or the employer’s investigation of

¹⁸ E.g., [Fluor Daniel, Inc.](#), 304 NLRB 970 (1991), enf’d. 976 F. 2d 744 (11th Cir. 1992).

¹⁹ These comments are equally applicable to situations involving other forms of discrimination, such as the imposition of harsher worker conditions or the denial of benefits.

that misconduct, it should consider issuing an investigative subpoena so a valid defense is not presented for the first time at trial.

If union and non-union supporters were treated the same way, it is imperative to have *evidence* that will explain to the judge why an employer who wanted to retaliate against employees because of their union activity would also discipline employees who did not engage in that activity. This is particularly crucial where the employees admittedly engaged in something that can be characterized as misconduct. Such affirmative evidence may consist of testimony that during the union campaign the employer's plant manager threatened to crack down on employee tardiness from breaks if a union were selected.

The fact that union adherents were disciplined for something that had been previously tolerated may not, standing alone, be sufficient to carry the General Counsel's burden of proof. For example, a new supervisor or manager may have noticed the conduct and found it totally unacceptable, or the evidence may show that the conduct only recently came to the plant manager's attention and he ordered it stopped because of his concern over the recent low production numbers. In a case presenting this fact pattern, evidence that demonstrates a causal connection between the discipline and the union or protected, concerted activity is essential to establishing a violation of the Act.

c. Careful Evaluation of the Wright Line Defense and Use of a Sliding Scale to Evaluate the Case

In *Wright Line* cases, the General Counsel's prima facie case can be weakened by the lack of strong disparate treatment evidence or by evidence of the discriminatee's egregious misconduct. Consistent with the First Circuit's opinion in *NLRB v. Hotel Employees and Restaurant Employees International Union Local 26, AFL-CIO*, 446 F.3d 200 (1st Cir. 2006), a sliding scale is a useful means of evaluating the likelihood of success in these type cases. The stronger the General Counsel case, the harder it is for respondent to overcome it; conversely, the weaker the General Counsel case, the easier it is for respondent to overcome it. Further, notwithstanding the burden-shifting, the ultimate burden of persuasion lies with the General Counsel. Cases must be evaluated thoroughly when a weak prima facie case with a strong *Wright Line* defense is presented.

When investigating and litigating discharge and other discrimination cases, the following points should be considered:

- (1) Pursue probative evidence of each element of the prima facie case, including evidence of union activity by the alleged discriminatees, employer knowledge, anti-union animus, timing and disparate treatment of comparable employees for substantially similar misconduct.

- (2) Pursue independent sources of information for relevant evidence during the investigation, whether it strengthens the prima facie case or supports the *Wright Line* defense.
- (3) Confront the charging party with the *Wright Line* defense to see whether it is seriously disputed by the charging party or can be rebutted.
- (4) Consider using investigative subpoenas to verify the facts underlying the *Wright Line* defense or to gather evidence to show whether or not there was disparate treatment. Disparate treatment evidence must be carefully analyzed to be sure it is comparable. The treatment of long-term and short-term employees may be different without establishing pretext. In addition, employee misconduct must be known to the employer and must be substantially similar.
- (5) Avoid presenting the discriminatee as the General Counsel's sole witness. Instead, always try to present other neutral witnesses and documents in order to corroborate one or more elements of the prima facie case.
- (6) Do not wait for rebuttal to present strong evidence. If there is good, strong evidence supporting the General Counsel's case, include it up front in the case in chief. If there is evidence of shifting defenses, include it as part of the prima facie case.²⁰

After the investigation has been completed, the case must be carefully analyzed and the strength of the prima facie case evaluated in comparison to the strength of the *Wright Line* defense in order to determine whether the case has merit, considering the totality of the facts. If the case is determined to have merit, efforts should continue to present the strongest possible case at trial.

2. Disparate Treatment

a. Instances of Disparate Treatment Must be Comparable and More than an Insignificant Departure from a Generally Consistent Past Practice

Even if a Region presents evidence of disparate treatment, the charged party may be able to distinguish or explain the disparity. Therefore, it is important to carefully investigate and evaluate the instances of disparity in order to determine whether the circumstances surrounding the alleged disparity are truly comparable to the circumstances involved in the alleged discrimination. It is

²⁰ Respondent's shifting defenses may be established through, *inter alia*, careful examination of witnesses under F.R.E. 611(c) and/or respondent's position papers.

also helpful to establish that the disparity is a significant departure from a generally consistent past practice. See [Publix Super Markets](#), 347 NLRB 1434, 1439 (2006).

b. When Arguing Disparate Treatment, Establish the Charged Party's Knowledge that the Circumstances Were Substantially Similar

In discrimination cases, when pursuing a disparate treatment theory, it is necessary to show that the charged party had knowledge that the circumstances were substantially similar. Charging party witnesses can alert the Board agent to potential disparate treatment, allowing the Board agent to draft very specific document requests. Because the stress is on condonation of comparable bad conduct, the Board agent should ask for records of counseling and lower levels of discipline, not just discharges, which may be infrequent. The Region should request complete personnel files to see if employees who were ultimately discharged had engaged in earlier bad conduct that was condoned. Both witness testimony and a charged party's documentary evidence may be necessary to fully establish knowledge. The particular examples that the Region is relying on to show disparate treatment and the charged party's knowledge of the circumstances should be fully set out in the decisional document. Strong evidence of disparate treatment, clearly showing that the charged party knowingly treated substantially similar conduct disparately, lessens the need to rely on credibility resolutions based on demeanor.

3. Advice Issues and Research

a. Consider Whether the Case Should Be Submitted to Advice

(1) Mandatory Submissions. Although Regional Directors generally have the responsibility for determining when a case should be submitted to the Division of Advice, [GC Memorandum 07-11](#) sets forth an extensive list of specific issues requiring mandatory submission. Given the length of the list of mandatory submissions, to avoid the possibility that an issue is overlooked, each Region should designate someone to review [GC Memorandum 07-11](#), or subsequent GC memoranda regarding mandatory Advice submissions, to determine whether the factual matter being determined is one which may require a mandatory submission to Advice.²¹

(2) Novel Legal Issues. Regions must seek input from the Division of Advice on a novel legal issue or with respect to a developing area of the law. Emerging legal issues are often highlighted by individual Board

²¹ OM Memoranda addressing cases that are being coordinated by Operations-Management or a Region are issued periodically and should also be reviewed. The most recent is [OM Memorandum 09-91](#).

members in footnotes to recent Board decisions indicating the Board Member wishes to revisit or reconsider outstanding precedents.

With respect to developing areas of the law, the General Counsel has a strong interest in articulating the legal theories and arguments to be advanced in the litigation of cases shaping future Board precedents. The Division of Advice's review of a case that is not controlled by extant precedent is critical in developing the appropriate arguments and legal theories. Therefore, cases involving novel legal issues or developing areas of the law are required to be submitted to the Division of Advice after completion of the investigation and prior to the implementation of the Region's proposed determination.

If a Regional Director is uncertain whether the submission of a case to the Division of Advice is warranted, the Director should call one of the managers in the Advice Branch and discuss the legal issue(s) presented by the case. Such telephonic consultations with the Division of Advice occur frequently and may assist Regional management in making the appropriate decision about the need to submit a case to Advice.

(3) Informal Consultation with Advice or Operations-Management. Consultation with the Division of Advice or the Division of Operations-Management on high-profile cases that are likely to garner substantial press attention is also warranted. The General Counsel must be fully informed concerning high profile cases and how such cases are being handled and resolved by a Region. In some cases, the General Counsel may indicate that the issues raised by a particular charge should be decided only after the case is submitted to and reviewed by the Division of Advice. In other high profile cases in which no Advice issues are raised by the charge, Regional management may prepare an e-mail summary of the Region's determination on the merits and forward it to Operations-Management. Such consultations in advance of implementing the Regional determination will ensure that the Director's decisions are consistent with General Counsel policy.

(4) Continued Consultation after Issuance of Complaint. Finally, after the Division of Advice or the Office of Appeals has authorized the issuance of complaint, it is important for a Region to contact the Headquarters office if later factual or legal developments make it necessary to alter the theory of the case or to reassess the decision to issue complaint. Cases that are scheduled for hearing often evolve. Factual developments may occur or witnesses, on occasion, may materially alter their testimony during pre-trial preparation. Such developments sometimes call into question the theory on which the Region was authorized to proceed to trial. When such circumstances occur, it is important for a Regional Director to consult with the Headquarters branch about any material change in a case. The Region should also consult with the Division of Advice or the Office of Appeals to be sure that the theory authorized is being properly presented in all phases of the litigation.

b. Undertake Thorough Legal Research to Ensure a Successful Outcome

Unusual or close legal issues raised by the case require careful and thorough legal analysis.

(1) Complex Legal Issues. Certain issues should be recognized at the outset as requiring particularly careful legal scrutiny. These include cases with multiemployer units, Section 8(f) relationships, Section 10(b) defenses and Section 8(b)(4) and 8(e) allegations. For example, in cases presenting multiemployer association issues, it is necessary to painstakingly analyze the facts, relevant contractual provisions and current case law in order to work through the distinction between an employer being bound to a collective-bargaining agreement by virtue of being part of a multiemployer unit, on the one hand, and being bound to a “me-too” agreement, on the other hand. Similarly, in cases arising from a possible 8(f) relationship, whether an employer is a contractor in the building and construction industry is an issue that may be resolved only after thoroughly researching the case law and carefully applying the Board’s legal standard to the facts of the case at hand.

Thorough legal research is always necessary to determine the correct legal standard to be applied and the elements required for establishing a violation of the Act. For example, in a case involving access to an employer’s premises, the legal standard is different depending on whether an employee or non-employee is involved and whether outside areas or inside areas are in dispute. Another example is a duty of fair representation case involving grievance processing where proving that the grievance is meritorious is an essential element when seeking a make-whole remedy for the unlawful refusal to process the grievance.

(2) Up-to-Date Research. Regions must not only perform thorough legal research prior to trial but also rigorously analyze the merits of a case at the conclusion of the investigation in order to ensure that the correct legal standard is applied to the facts of the case and that the evidence is sufficient to establish all the necessary elements of the alleged violation. Because of the press of work, it is easy for a Board agent or a Regional manager to assume that they are already aware of the nuances of the legal issues raised by a case. However, a review of the case law often highlights new decisions changing the standards or critical issues that must be addressed in resolving the merits of the case. This is particularly important in cases raising unusual or close legal issues.

While researching Advice memoranda is often helpful, Regions must be cautious in following legal theories outlined in older Advice cases. If a Region is unable to locate a more recent Advice memorandum, a best practice is to call and check with Advice to determine if the theory set forth in the Advice memorandum is still being pursued, especially if the Advice memorandum had

issued under a prior General Counsel or if substantial time has passed and the theory being pursued has not been adopted by the Board.

H. FIRs and Other Decisional Documents

Using the principles from the [Agency's Legal Writing Program](#) will help make the reader smart and thereby assist the Region in making sound decisions and in clearly communicating these decisions to others in the Agency and to the public. Regions are encouraged to use the videotape of the condensed writing course, "The Fundamentals of Effective Writing and Editing Condensed," which ably presents the ideas of the longer course, to train new employees and reinforce these principles for current employees.

In preparing a final investigative report (FIR), agenda outline, or other decisional document, the Board agent, who has the advantage of personal knowledge of the witnesses and a comprehensive understanding of the facts and law, must do the "heavy lifting" and convey a sense of the case to the reviewers and decision makers. Below are some suggested practices for writing those decisional documents, and some practices to avoid in those documents.

1. Suggested Practices

a. *Begin with an introductory overview and overall recommendation.* An introductory overview and overall recommendation will assist the reader in absorbing and understanding the case. The crucial facts and analysis should be up front and "in your face," so the problems of the case are highlighted for the reviewers and the decision maker. With a particularly long case, subsidiary overviews of each section may be warranted. These overviews should not be just a bare recitation of the allegations and recommendations without analysis, but should convey a real sense of the factors that are necessary to decide the case. This knowledge facilitates a "smart" reading of detailed facts.

b. *Inventory the evidence.* At the beginning of the document, listing the affidavits, documentary evidence, and position papers provided will help the decision maker understand the nature of the evidence and the cooperation of the parties.

c. *Use headings and good topic sentences.* Assist the reader by using headings and have a good topic sentence at the beginning of each paragraph to provide guidance. Err on the side of including more headings since it provides the reader a good roadmap of what is coming. Keep noting the significance of particular facts and analytic points in the development of the facts and analysis.

d. *Introduce lengthy quotes.* When using lengthy quotes, introduce them by stating the purpose and content of the quote. Otherwise, readers tend to skim quotes. A quotation of four or more lines should be indented from the left

and blocked. A judicious use of quotes is useful, but there can be too much of a good thing.

e. Repeat titles often. Because the reader does not have the same knowledge of the witnesses as the writer, use witness titles and positions frequently, not just when they are introduced. Also, consistently identify people by their last name instead of switching back and forth between first and last names. In appropriate cases, a cast of characters at the beginning of the decisional document is helpful.

f. Provide foundation for conversations. For each significant conversation, provide the evidence that would be used in laying a foundation at trial – who, when, where, and what, repeating the language as much as possible for important points, rather than using conclusory language.

g. Cite sources for key evidence. For 8(a)(1) statements and other crucial information, indicate the page and line of the affidavit or document where it appears. Provide the specific language of 8(a)(1) allegations and other crucial statements.

h. Use one version as an exemplar. To the extent that witnesses corroborate each other, identify each corroborating witness but do not repeat each version. Use the charged party's version as an admission or the lead witness' version as the exemplar and then indicate how the other witnesses' versions differ.

i. Identify disputed facts. Highlight the undisputed facts and then indicate the disputed additional facts, analyzing the probabilities of each version. Stress undisputed documentary evidence. If possible, begin the facts section with a statement that the facts are undisputed unless otherwise indicated.

j. Acknowledge gaps. To ensure a correct decision is reached, explain instances where corroborating evidence, supporting documents, or relevant details have not been provided.

k. Adapt the document's organization to the case. Consider the case in choosing the organization of the decisional document. If timing is key, organize the decisional document chronologically and then expand on the more complex allegations, such as discharges. For other allegations, a topical outline may be more suitable.

l. Separate facts and analysis. It is essential to differentiate facts from analysis. To this end, you might organize the document like an ALJ decision: the facts, the positions of the parties, and the recommendation and analysis. Such a format also facilitates modification of the analysis to include the agenda discussion and decision. For complex or lengthy cases, consider following this format for each section of the document so that the analysis closely follows the relevant facts.

m. Remind the reader of crucial evidence in the analysis. In the analysis, refer specifically to evidence crucial to the recommendation. For example, with a discharge allegation, cite specific 8(a)(1) statements directed at the discriminatee, rather than simply reference the animus discussed above.

n. Cite current authority. The decisional memo should include case law for all but the most obvious allegations, with the relevant holdings and analysis fully developed. Beware of reliance on familiar principles or boilerplate without adequately checking the latest case law.

o. Outline and edit. Remember that less is more. Before writing, outline the document to be sure all elements of each allegation are covered. After completing a draft, edit it to remove any unnecessary facts, which merely obscure the story, and emphasize the critical facts and analytical conclusions.

2. Practices to Avoid

a. Excessive length. Excessively lengthy FIRs are problematic both because they are time consuming for Regional decision makers to read and because their length makes it difficult to focus on the key elements.

b. Extensive cutting and pasting from affidavits. The use of the cut-and-paste function to create large segments of FIRs or other decisional documents impedes succinctness, sound organization, and analysis. Although a brief quote of the witness' version of a potential 8(a)(1) statement is desirable, extensive cutting and pasting from affidavits is not. This makes the document considerably longer and can cause the important facts and issues to get lost. The Board agent should evaluate and distill the important information without pasting lengthy sections of affidavits into the report.

c. Avoid introducing new facts in the analysis section. All facts should be included in the facts section and not introduced for the first time in the analysis.

d. Avoid organizing the document witness-by-witness. Discussing all evidence presented by one party or witness and then discussing all evidence presented by another party or witness, rather than organizing the evidence by chronology or by issue, is very difficult for the reader. It requires the reader to flip back and forth in order to get a picture of the evidence on a particular violation. This is inconsistent with the purpose of the document, which is to assist in making a decision. It also forces the reader to do the writer's job, which is to assemble the facts in an understandable way.

e. Excessive use of footnotes or placing important information in footnotes. Footnotes are a distraction to the reader and should be used sparingly. If the information is important, it should be placed in the body of the document so it will not be overlooked.

I. Decision-Making

1. The Decision-Making Process

The decisional process must include a very careful and sound factual and legal analysis of the issues raised by the charge. That careful analysis should not end with the initial determination but should continue throughout the processing of the case.

The critical prerequisite for a sound decision is a thoughtful review of the evidence, which can be achieved in the decisional memo or a combination of the memo and an oral agenda. In accord with the Agency's established practice, prior to dismissal or complaint, the Board agent must prepare a comprehensive memo marshalling the facts and the analysis to enable the Board agent, the supervisor, and the managers to feel confident about the soundness of the decision and the lack of any "holes." Some Regions prepare all or part of this memo or an outline before an oral agenda, some prepare the memo after the agenda, and others rely on the memo rather than an agenda. The appropriate procedure is left to a Regional Director's discretion. If a written outline or statement of facts is prepared before the agenda, adequate time to review it must be given between its circulation and the agenda. Ultimately, a section of the memo should succinctly state the Regional determinations with supporting evidence and case law.

The practice of having an agenda on a complaint case differs from Region to Region and even from case to case within a Region. The practice also differs on what point in the decision-making process an agenda might be held and on the degree to which the case is written up before or after the agenda. Despite these different practices, in appropriate cases it is useful to have a meeting, whether in person or by conference call, to explore the facts and the analysis on a collaborative basis. Such meetings, like the decisional memos, help to identify hidden problems in the case. The Regional Attorney or another manager should usually be at an agenda where complaint will be recommended, in order to provide continuity and oversight in the litigation of the case.

All cases should be rigorously critiqued as they are reviewed. All participants in the decision should provide their recommendations with supporting analysis. Any participant believing that a case is close should flag the issues of concern at the agenda and in the decisional memo.

2. Merit Cases

Unless quickly resolved by settlement, merit cases present special decision-making challenges. The Region must be sure that all allegations slated for complaint are, and remain, suitable for litigation.

a. Carefully Scrutinize Each Allegation for Factual and Legal Merit

Sometimes certain allegations receive little scrutiny because a case has so many allegations, or has other allegations that become the focus of most of the attention. While that is understandable, it is important to independently assess each allegation and determine whether all the elements of a violation can be established. A failure to do so may result in proceeding on allegations that cannot be established and negatively impact other parts of the case. Careful analysis of each allegation before issuing complaint will avoid having to amend out the allegation later when the trial attorney realizes that proof of a key element of a violation is missing or that all the elements were not fully considered.

The Region should not proceed on an allegation with insufficient support in the hope that it will be bolstered by other allegations in the case. The reverse is usually true. Each allegation should be decided on its own merits after a careful legal and factual analysis, and should stand on its own. Allegations that are not supported by substantial evidence will undermine the General Counsel's witnesses and detract from the case. A witness' testimony about unsubstantiated allegations may hurt the witness' credibility on other allegations involving the same witness. Those allegations may also detract from the strength of the overall case because the administrative law judge may take a more skeptical view of the balance of the General Counsel's case.

In sum, each allegation must be carefully analyzed and decided on its individual strength before being added to the case.

(1) Ensure the evidence is solid. The key elements of a prima facie case must be supported by affidavits, documents, or admissions that qualify as admissible trial evidence. For example, if a discriminatee asserts, even in an affidavit, that another employee was treated disparately, that assertion is a lead that should be followed by obtaining either an affidavit from a witness with direct knowledge or employer records. Similarly, it is important to substantiate witnesses' memories of past practices and discriminatory changes with employer or union records. In another example, in a case involving an alleged 8(a)(5) unilateral change it is important to determine whether: 1) the change was material and substantial, 2) the union first learned of the change within the 10(b) period and 3) the union appropriately requested bargaining if it learned of the change before it occurred. To confirm that the key elements have been established by evidence admissible at trial, it is helpful to segregate the affidavits in the file for review, and to identify (e.g., by affidavit page and line number) the sources of information in agendas and decisional memos.

(2) Do not make assumptions about the law. Every step of the legal analysis, including all potential defenses, must be pinned down. Each complaint allegation should be fully supported by case law in the decisional

document. The trial attorney should not be in the position of having to begin legal research about facts or issues known in advance of the Regional decision.

b. Continuously Review a Case for Changes in the Facts, Law, and Likelihood of Success at Trial

The pre-complaint decisional process must include a very careful and sound factual and legal analysis of the issues raised by the charge. After a decision is made, although the further processing of a case should not discourage reconsideration, experience has shown that it often does.

In some litigation losses, it appears that determinative facts changed or were not appreciated at an earlier stage of the investigation and litigation process. In other cases, the legal theory did not stand up because either determinative facts undermining the legal theory might not have been appreciated earlier or the law might have changed.

Like all prosecutors, Regions have the difficult task of fully developing the evidence and then making a fair determination. Unlike an appellate reviewer who has fact determinations that are fixed, the Regions must deal with facts that may change after additional witnesses and documents are produced and are subject to the rigors of litigation. To ensure that Regions respond appropriately to such changes, Regions must be open to reconsideration where appropriate and every person involved in handling the case must take personal responsibility for rigorously reviewing the strength of the case.

Sometimes when the theory of the case is substantially changed or some allegations are dismissed, settled or withdrawn, the remaining case presents a very weak vehicle for trial. Be sure that the remaining case stands on its own. This analysis can be aided by preparing a supplemental decisional document limited to that part of the case that the Region will litigate.

c. Consider Alternative Methods of Disposition for Allegations

Some litigation losses have resulted where there was of a lack of corroboration, or where the alleged unfair labor practices were minor or isolated. Regions should consider whether more appropriate “alternative methods” are available for handling such allegations and whether, given our limited resources, the Agency should litigate allegations where a Regional Director has determined that the likelihood of prevailing at trial is problematic. In appropriate situations, Regions should consider de minimis or non-effectuation dismissals or merit dismissals.

Regional Directors have long had the authority to dismiss allegations on de minimis grounds or in circumstances where it has been determined that it

would not effectuate the Act to proceed in the matter.²² In addition, [CHM 10122.2\(c\)](#) allows Regions to issue merit (conditional) dismissals in circumstances where: the conduct is isolated in nature; there is no ongoing unlawful effect on an employee's terms and conditions of employment; there is neither impact on other employees nor other accompanying violations which require a Board remedy; the conduct has minor group impact; or the conduct is of limited duration. See [GC 02-08](#), [OM 01-76](#), and [GC 95-15](#). Indeed, on appeal to the General Counsel, conditional decisions have issued denying the appeal in circumstances where there was minimal impact and dissemination.

Using alternative methods for appropriate cases recognizes that Agency resources should be applied where they will be most effective, allows Regional Directors to exercise their discretion to decline to prosecute meritorious cases where the public cost would outweigh the public benefit, and will assist in avoiding having problematic allegations "pull down" the strength of the General Counsel's overall case.

In these cases a charging party may complain that a merit dismissal does not provide for a full remedy. However, a timely merit dismissal letter, setting out the nature of the violation determined to have arguable merit, in terms written as strongly as deemed appropriate, is more beneficial to a charging party than a loss down the road. Moreover, inasmuch as a merit dismissal letter provides for holding the matter in abeyance for six months during which time, if new meritorious charges are filed, the matter may be reconsidered,²³ its issuance serves to deter future violations. While that deterrence may not be as complete as a full settlement or Board Order, it is certainly greater than that which would be obtained if the matter were litigated and lost.

Regions should also consider *Collyer*,²⁴ *Spielberg*²⁵/*Olin*,²⁶ *Malrite*,²⁷ *Alpha Beta*,²⁸ and deferral to court proceedings under *Advanced Lightweight*.²⁹

²² See [American Federation of Musicians, Local 76 \(Jimmy Wakely Show\)](#), 202 NLRB 620 (1973); [Square D](#), 204 NLRB 154 (1973); [Wichita Eagle & Beacon](#), 206 NLRB 55 (1973); and [Bellinger Shipyards](#), 227 NLRB 620 (1976).

²³ During the abeyance period, additional evidence in support of the allegation may have been discovered, thereby enhancing the prospects of prevailing in the matter at trial if litigation becomes necessary.

²⁴ [Collyer Insulated Wire](#), 192 NLRB 837 (1971).

²⁵ [Spielberg Mfg.](#), 112 NLRB 1080 (1955).

²⁶ [Olin Corp.](#), 268 NLRB 573 (1984).

²⁷ [Malrite of Wisconsin](#), 198 NLRB 241 (1972), *enfd. sub nom. Electrical Workers (IBEW) Local 715 v. NLRB*, 494 F. 2d 1136 (D.C. Cir. 1974)(requiring parties to enforce arbitration awards in the courts rather than NLRB proceedings).

²⁸ [Alpha Beta Co.](#), 273 NLRB 1546 (1985), *review denied sub nom. Mahon v. NLRB*, 808 F. 2d 1342 (9th Cir. 1987)(extending NLRB deferral principles to settlement agreements reached during grievance and arbitration proceedings).

Moreover, when there are overlapping ULP and objections issues, Regions have been very successful in first pursuing the objections, the crucial concern, while holding the ULPs in abeyance in appropriate cases.³⁰ The results of the objections will usually obviate the need to go forward on the unfair labor practices.

3. Potential Pitfalls in Information Cases

Given the importance and frequency of charges alleging a refusal to provide information, the Committee has identified some of the unique potential pitfalls to correctly deciding and successfully litigating these allegations.³¹

a. Identify factual issues that pose problems. Regions perform a valuable service for parties with incumbent unions by resolving information charges, mediating the disputed issues, which may stem from miscommunications or overreactions, and either obtaining a full resolution or narrowing the issues. As a result, litigation can be focused on substantial factual and legal issues and the pursuit of recalcitrant respondents. Such a practical approach benefits the parties by getting the information to the charging party in a timelier manner than is achievable through litigation.

Cases that are not settled during the investigation sometimes present factual issues that are overlooked in the often lengthy requests and responses. Those issues include situations where: (1) relevance of the requested information is unclear; (2) the request encompasses confidential or irrelevant information; (3) some information was provided and the charging party has not notified the charged party of missing information it still needs; and (4) the existence or scope of an oral request is disputed. Recognizing these issues during the investigation is important. When confronted with these issues, the charging party may wish to address the issues or withdraw the charge. If a new request would not be moot³² or barred by Section 10(b),³³ the charging party may choose to make a new

²⁹ *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988). GC Memoranda [95-8](#) and [88-4](#) (outlining procedures to remedy allegations of a failure to pay contractual benefits, such as pension funds and health and welfare funds).

³⁰ [CHM 11407](#).

³¹ For a full discussion of case law and investigatory procedures, see [Professional Development Program Module 29: Investigating Information Request Cases, Instructor Guide](#).

³² [Module 29](#), above at 29, cites cases where the need for information no longer exists, as when there are no longer any grievances or negotiations for which the information would be relevant.

³³ [King Broadcasting Co.](#), 324 NLRB 332, 336 (1997) (later request was determinative for 10(b) purposes, because made after the charging party had received further evidence of non-compliance with collective-bargaining agreement, distinguishing [United Slate, Tile & Composition Roofers](#), 202 NLRB 851 (1973) (no violation where there is mere reaffirmation of time-barred conduct)).

request that would put the charged party to the test and clarify whether there is a real issue at stake or merely a miscommunication.

(1) *Relevance of the requested information is unclear.* When the information requested is not presumptively relevant, the party seeking the information must demonstrate its relevance.³⁴ The requesting party must either inform the other party of the relevance, or it must be apparent to the charged party based on the circumstances.³⁵

(2) *The request encompasses confidential or irrelevant information:* A charged party cannot simply refuse to supply information because certain items are confidential, but must make a “‘particularized showing’ of legitimate and significant confidentiality concerns related to specific information requested by the [u]nion that must be balanced against the [u]nion’s need for that information.”³⁶ Nevertheless, a charging party may have made an overly broad request, such as for entire personnel files of nonunit employees, which goes beyond the needed, relevant information.

(3) *Some information was provided and the charging party has not notified the charged party of missing information it still needs.* When the charged party supplies some but not all the information, raises legitimate objections to the information it does not provide, and offers to discuss the provision of information further with the requesting party, the Board may conclude that a sufficient accommodation of the competing interests has been made.³⁷ Without a response, the charged party may legitimately believe the information supplied satisfied the charging party.

(4) *The existence or scope of an oral request is disputed.* When there is a factual dispute as to the existence or scope of an oral request for information, the General Counsel must carefully consider whether the burden of proof can be met that the request was made.

b. *Examine the defenses.* Carefully examine the charged party’s defenses, especially when it has a history of complying with information requests. If the failure to give information is uncharacteristic, there may be a communication problem or a legitimate concern, such as confidentiality or the potential to compromise an investigation, which, when balanced against the charging party’s need for the information, would be a valid defense.³⁸

³⁴ [Disneyland Park](#), 350 NLRB 1256, 1257 (2007).

³⁵ *Id.* at 1258.

³⁶ [National Broadcasting Co.](#), 352 NLRB 90, fn. 2 (2008).

³⁷ [Northern Indiana Public Service Co.](#), 347 NLRB 210, 214 (2006).

³⁸ See *Detroit Edison v. NLRB*, 440 U.S. 301 (1979).

c. Separately analyze each item requested. As with a history of good faith in providing information, when the charged party provides some items and not others, it is more likely to have legitimate concerns than if it makes a blanket refusal. In such cases, check for defects in the request. Even if the charged party raises legally insufficient defenses, the Region must concentrate on establishing each element of its prima facie case and not be distracted by spurious defenses.

d. If the charged party claims that a requested document does not exist, ensure there is evidence to establish that it does exist. When the charged party asserts that a requested document does not exist, the charging party must provide evidence to show it does exist before a violation can be established.

J. File Documentation

Each file must be self-contained. Throughout the investigation, the Board agent should maintain a current record in the case file of the agent's contacts and activities to help the investigator cover all leads in an organized manner and make it easier for any reviewer of the file or the litigator to understand how the process evolved and the results of each lead. See [CHM 10054](#) and [11850](#). Among the necessary file documents are:

- the IO Contact Report, whenever there has been an IO contact;
- commerce information;
- cross-references to prior and pending related cases;
- notes or contact sheets showing the progress of the investigation, including all contacts with witnesses and parties and the efforts to obtain witnesses and get responses to evidence;
- all correspondence by letter or e-mail between the Board agent and the parties and other contacts, including EAJA letters;
- all affidavits, including signed affidavits of telephone affidavits, and documentary evidence;
- investigative subpoenas and related documents;
- position papers;
- confirmation of the charged party's failure to cooperate, if applicable; and
- copies of essential documents such as decisional documents and formal papers.

Although not exhaustive, this list highlights the need to document all stages of the investigation. The Region should designate someone to verify that all necessary documents are included in the file at critical junctures, such as complaint, dismissal, or closing of the case.

K. Deferred Case Management

In light of the Agency's new over-arching goals, high priority must be given to managing the status of deferred cases. Ensuring that deferred cases are regularly monitored, that parties timely submit and process the underlying issues in the grievance procedure, and that deferred cases are resolved at the earliest possible time, may significantly impact a Region's over-arching goal performance.

A model deferral program includes the assignment of a supervisor or manager who will be held accountable for ensuring the program's success. The key is the supervisor or manager's active participation or oversight in the administration of the program.

The supervisor or manager should oversee the work of a support staff employee to ensure that follow-up letters are sent out in at least one-third of all deferred cases on a monthly basis, thereby ensuring that such letters will be sent in all cases within 90-day increments. It is recommended that the initial letters and any follow-up letters be signed by the supervisor or manager.

The date the letters are sent in each case should be entered into CATS in the Deferral Screen as the Date Deferral Checked. Upon receipt of a response, the information obtained should be entered into CATS as a Case Note and the supervisor or manager should determine what action, if any, should be taken or whether the case should remain in deferred status with another follow-up in 90 days.

Should no response be received within a week or two weeks, whichever deadline date for response the Region has given, the support staff employee should notify the supervisor or manager, who could then either personally call the parties or assign an agent to call the parties and advise them of their obligations to respond and of the possible consequences for not doing so. Calls are often more effective in getting early responses than are letters.

A second letter should also be sent advising the charging party that a failure to respond by the deadline date will result in the case being dismissed based on the charging party's apparent lack of further interest in the matter. If no timely response is received from the charging party to the second letter, the case should be promptly dismissed.³⁹

Obviously, whenever there are doubts as to what action, if any, should be taken with respect to deferred cases, consultation with the Regional Director is advised.

³⁹ When a case has been resolved by settlement or by a favorable arbitration award but the charging party refuses to withdraw, the dismissal should be treated as adjusted.

To assist the Regions, CATS analysts have developed, and provided to the Regions, a query which not only draws data directly from CATS to show the date of the last deferral check but also calculates and displays the date when the next letter should be sent. The CATS analysts have also developed a second query that supplements the earlier query by adding the date of the latest “note” on a case. If Regions place information they learn following a deferral check into CATS notes (such as an allegation the grievance is no longer being processed, has been settled, or that an award has been issued), the query will allow anyone using it to easily discover which deferred cases need immediate further action. Those responsible for monitoring deferred cases should place the query on their “desktop” and run it weekly or at least biweekly to obtain the information they need to ensure their Region is timely following up on its deferred cases.

In addition to the above, some Regions run the Overarching Goal Smart Report to identify deferral cases that are approaching 365 days old to ensure they obtain special emphasis.

Should the deferral check result in notification of a significant event such as a settlement, arbitration award, the dropping of a grievance or other issue warranting regional action in a case, the Date Processing Resumed field in CATS should be completed. This will result in the case being listed on the Cases Under Investigation report, a standard report in CATS, thus providing another means of identifying those deferred cases for which prompt action is needed. Although the cases will appear on the Region’s Cases Under Investigation Report, the cases will not appear on the monthly Overage C Situation Report.

Upon a significant event requiring further investigation or other action, the supervisor or manager responsible for monitoring deferred cases should determine whether he or she will complete processing of the case or whether it should be assigned to an agent. Often, an assignment is made to the agent originally assigned to the case. However, if that agent cannot perform the work on a timely basis, the case should be assigned to someone else.

Regions should establish a deadline of 35 days for completion and reporting of a Spielberg review with final action to be taken within 14 days of the determination. Should a deferral be revoked and further investigation is warranted, the assigned agent should process the case in accordance with the Impact Analysis category appropriate for the case. Withdrawals should be processed as soon as possible but no later than seven days after receipt. The supervisor or manager responsible for overseeing the deferral program should periodically check with agents assigned these tasks to ensure they stay on track and the cases are completed within the suggested time frames.

There are, of course, acceptable variations to the suggested model. However, any system a Region may choose for following up on deferred cases must provide for active monitoring and processing of deferred cases even if

those responsible for the successful administration of the program are absent from the office or frequently diverted to perform other work.

II. SECTION 10(j) ISSUES

Appropriate processing of 10(j) cases includes the following key steps:

- a) Identify potential 10(j) cases at the time of filing;
- b) Expedite the handling of potential 10(j) cases;
- c) Obtain impact evidence when investigating substantive allegations;
- d) Notify the charged party that the Region is seriously considering whether 10(j) relief is warranted;
- e) Consider at agenda whether 10(j) relief is warranted;
- f) Document 10(j) decision-making in CATS; and
- g) Maintain an ongoing training program on 10(j) issues.

A. Identify Potential 10(j) Cases at the Time of Filing

The prompt and effective processing of 10(j) cases is one of the General Counsel's highest priorities. Regions can maintain a strong 10(j) program by adopting and maintaining systems and practices that ensure the appropriate handling of potential 10(j) cases, such as those listed in [OM 98-54](#). Among other practices and systems, the memo emphasized the need for Regions to have systems in place for the early identification and expedited investigation of potential 10(j) cases. In adopting this objective, some Regions modified their file forms to require at the time of filing a notation about whether the charge has 10(j) potential. In most instances, the entry on this form is made by the ARD or other Regional manager assigned the responsibility for reviewing new charges at the time of filing. In addition, the 10(j) potential of a case should be recorded in CATS.

Regions must also be vigilant to recognize that the 10(j) potential of a case may change during the processing of a case. For example, what appeared to be a case that would not require consideration of 10(j) relief may change either based on the receipt of new evidence, amendments to a charge, or the filing of related charges. Therefore, a Region should have systems in place to notify Regional management when there is a change in the status of a case such that 10(j) relief should now be actively considered. Similarly, Regional management should be made aware when the investigation of a case leads to a conclusion that Section 10(j) relief would no longer be appropriate. A number of Regions have devised forms for recognizing a change in the status of a case with respect to the need for 10(j) relief.

B. Expedite the Handling of Potential 10(j) Cases

The prompt investigation of cases in which 10(j) relief may be warranted is a key component of a successful 10(j) program. Regional management and supervisors should be actively involved in the oversight of potential 10(j) cases.

The early involvement of the Region's 10(j) Coordinator in helping to manage and prioritize 10(j) cases can also assist in ensuring that the Region is devoting adequate resources to these cases. Some Regions have had success in scheduling a preliminary agenda or case status meeting with the Director or other member of Regional management, usually held 2-3 weeks after filing, to review the status of the investigation and identify issues or problems that need to be addressed. Generally, an active 10(j) Coordinator should also provide guidance and direction to agents during the investigation, making sample 10(j) authorization memos available on the Region's shared drive, participate in the agenda of a 10(j) case and give advice and direction to the litigation of 10(j) cases in district court.

Time is of the essence in the handling of 10(j) cases since the Agency must demonstrate to a district court that it moved quickly to investigate and litigate a case in which we are asking a district court to impose the extraordinary remedy of injunctive relief.

C. Obtain Impact Evidence When Investigating Substantive Allegations

The Regional office staff should be trained to seek impact evidence when conducting the substantive investigation of any potential 10(j) cases. The Agency's [10\(j\) Manual](#) contains [checklists](#) for the investigation of the various categories of 10(j) cases. By ensuring that the Regional staff is familiar with and uses this important tool, Regions can ensure that impact evidence is obtained in a timely manner.

Generally, obtaining "just and proper" evidence may only involve asking a few additional questions of witnesses as to the impact of the unfair labor practices. Thus, capturing this evidence during the investigation does not unduly prolong the investigation even if it is ultimately determined that the charge is without merit or that 10(j) relief is not warranted. Therefore, Board agents should routinely seek such evidence in all potential 10(j) cases.

If such evidence is not obtained during the investigation, a Region may have to conduct a supplemental investigation in cases where 10(j) relief appears to be warranted, a process that can significantly delay the processing of a 10(j) case. In addition, due process requires that a charged party be notified and be given an opportunity to submit their position on the appropriateness of Section 10(j) relief.

D. Notify the Charged Party that the Region is Seriously Considering Whether 10(j) Relief is Warranted

Regions must also have in place a system for notifying the charged party that the Region is seriously considering 10(j) relief and seeking the charged party's position on this issue. The General Counsel has adopted a policy that requires that a charged party be notified, either orally or in writing, during the

investigation that a Region is considering the need for 10(j) relief if a case is of a type that may warrant 10(j) relief and the evidence from the charging party points to a prima facie case. In cases in which a Region raises 10(j) relief sua sponte, it is also important that the charging party's position on the need for 10(j) relief be sought.

E. Consider at Agenda Whether 10(j) Relief is Warranted

Sometimes a case's 10(j) potential does not become apparent until later in the investigation. In other circumstances, Regions have missed identifying the need for 10(j) injunctive relief in circumstances where such relief should obviously be considered. For example, quality reviews uncovered Regions that failed to consider the need for 10(j) relief evaluated in (1) cases in which an employer imposed an unlawful lockout on employees; (2) cases in which the employer had unlawfully withdrawn recognition from the union; and (3) cases involving 8(a)(1) protected, concerted activity discharges that have halted the Section 7 activity.

Regions have had success in ensuring the consideration of 10(j) relief at later stages of the investigative process by modifying forms to require the conscious consideration of the applicability of 10(j) relief. For example, FIR, agenda outline, and agenda minute forms can be designed to require an entry about whether 10(j) relief is warranted in every case. Moreover, it is important that Board agents memorialize in an agenda minute the Region's analysis of the 10(j) issue and not merely insert a conclusionary sentence that the Region determined that 10(j) relief was not warranted.

F. Document 10(j) Decision-Making in CATS

Regions should record their 10(j) decisions in CATS as these decisions are being made. The Division of Operations-Management reports to the General Counsel on a quarterly basis the results of a Region's 10(j) decision-making as shown by the 10(j) Quarterly Report, which is drawn solely from data entered in CATS. In order for a case to appear on the 10(j) Quarterly Report, two things must occur: 1) the "yes" box in CATS showing that a case has 10(j) potential, must be checked; and 2) a date must be entered in the 10(j) window of when a charged party was notified that the Region was seriously considering the need for 10(j) relief.

A Region must record in CATS its resolution of the 10(j) issues. If a charge is found to have no merit, then the Region need only record the no-merit decision in CATS. If the Region concludes that there is either partial or full merit to the charge, the Region must record one of the following four resolutions of the 10(j) issue: 1) that the Region concluded that 10(j) relief is warranted and is submitting a memorandum to the Injunction Litigation Branch seeking 10(j) authorization; 2) that the Region has decided to utilize the expedited hearing procedure in lieu of immediately seeking 10(j) relief; 3) that the Region has reached a settlement of the overall case or a settlement of the 10(j) issue, or 4)

that the Region has concluded that 10(j) relief is not warranted. A number of Regions have developed a form for recording this information in the file so that information on the Region's 10(j) decision-making is noted and then sending this form to a support staff employee so it may be entered into CATS. The key to accurate CATS data on 10(j) issues is that a Region's business process for handling its 10(j) decision-making should be reflected in a generally contemporaneous CATS data entry. In addition, the Region's 10(j) Coordinator should review on not less than a quarterly basis the information that is reflected on the Region's 10(j) Quarterly Report. Unless this is done, a Region's 10(j) Quarterly Report will not accurately reflect the Region's handling of 10(j) cases. The 10(j) Quarterly Report is utilized when Regional Directors' SES appraisals and PMRS appraisals are prepared. In addition, this data is reviewed to determine whether a particular Region's 10(j) program should be more closely reviewed by Operations.

G. Maintain an Ongoing Training Program on 10(j) Issues

All Regions should conduct periodic refresher training for experienced staff as well as presenting 10(j) training for newly hired Board agents.

The *PowerPoint* presentations utilized in the FY 2008 National 10(j) Videoconference Training conducted by Assistant General Counsels Judy Katz and Jim Paulsen provide an excellent vehicle for refresher training for experienced Board agents. Also two training modules ([Module 20](#) and [Module 21](#)) that may be utilized to train new Board agents are available on *Surfboard*.

The Injunction Litigation Branch regularly sends out E-mail alerts to Directors on 10(j) cases and this information can then be utilized to highlight 10(j) issues in a staff meeting. By maintaining ongoing 10(j) training, Regions will ensure that they are fully supporting the high priority accorded by the General Counsel to the 10(j) program.

III. COMPLIANCE CASES

[OM Memorandum 08-47](#) reaffirmed the General Counsel's commitment to compliance as one of his priorities. Particularly when the Region has prevailed in litigation and there is a formal compliance case, that case should receive top priority to provide the hard-won remedy expeditiously. In most Regions, the staff members overseeing compliance handle both informal settlement agreements and formal compliance cases. They also may assist staff members in using tools such as PACER, AutoTrack, and social security search methods in noncompliance cases and calculating backpay in cases prior to the compliance stage. To improve the expeditious handling of compliance cases, while maintaining high quality, Regions should consider adopting the following best practices.

A. Increase the Number of People Expert in Compliance Work

1. Develop compliance experts. It takes some time and concentration to develop expertise in compliance. In some Regions, this expertise may be developed by having a specialized compliance team that includes at least one attorney, one field examiner, the compliance officer, and the compliance assistant who are supervised by one supervisor. This approach develops the expertise of everyone on the team and allows most compliance cases to be handled by the team. In smaller Regions, separate compliance teams may not be feasible. In those Regions, the desired expertise may be developed by a conscious effort to train and involve multiple people in compliance work. We recognize that this may be a difficult objective to achieve given Regions' conflicting priorities and limited resources, but all Regions should make their best efforts to develop back-up capabilities in compliance.

2. Cross train supervisors on compliance. A second supervisor should be cross trained in compliance. Again, this helps prevent an interruption for any reason.

3. Involve managers in supervising compliance. Either the Regional Attorney or the Assistant to the Regional Director should be responsible for overseeing compliance. As with cross-training of supervisors, such involvement ensures that quality oversight will not be interrupted.

4. Train additional attorneys to do compliance litigation. This training includes the taking of depositions and litigation of compliance hearings.

5. Develop the responsibilities of the Compliance Assistant. Compliance assistants are full members of the compliance team and should become fully trained on the use of PACER, AutoTrack, and other investigative tools. The Compliance assistant will provide another resource for agents who do not regularly handle compliance cases, thereby freeing up the other members of the compliance team to work on the more difficult compliance cases. Further, the assistant can be trained to perform simple backpay calculations and assist other professionals. Regions might also consider using other support staff employees to perform these tasks.

6. Adapt to the structure and size of different Regions. Although it can be very difficult for small Regions to handle multiple priorities, they share the same consideration present in larger Regions that expertise cannot rest exclusively in one or two people who may not be able to sustain the work. Similarly, Regions with Resident Offices or Subregions must have adequate expertise in each office or a method of providing support and oversight.

B. Assign Some of the Work Now Performed by Compliance Staff Members to Other Staff Members

1. Use the general knowledge of staff members to assist compliance efforts. Certain types of compliance assignments require knowledge and investigatory techniques that are generally familiar to Board agents. Such topics include alter ego, single employer, successor, and individual liability. Investigations of these issues can be assigned to one Board agent while someone else focuses on other allegations or aspects of the compliance investigation.

2. Train staff members to use search tools. Other employees, including support staff employees, may be trained to use PACER, AutoTrack, etc.

3. Increase expertise in calculating backpay. All Board agents should be trained to do backpay calculations. Members of the compliance team should only be helping to compute backpay in the most difficult cases.

C. Take Advantage of Improved Methods and Procedures for Performing Compliance Work

1. Involve all professionals in the early investigation of compliance issues. As [St. George Warehouse](#), 351 NLRB 961 (2007), places the ultimate burden on the General Counsel to establish mitigation efforts by our discriminatees and [Grosvenor Resort](#), 350 NLRB 1197 (2007), further requires these discriminatees to begin their search for work within two weeks of their discharge or risk tolling backpay, the Regions should gather preliminary backpay information early during the investigation rather than leave these issues for the compliance team to handle during the compliance phase of the case. To protect the efficacy of the Board's backpay remedy, backpay issues must be investigated as soon as possible. By raising these issues early and collecting this data at the initial stage of the investigation, the Region is taking a proactive approach that will ultimately protect the viability of the Board's backpay orders when they reach the compliance stage. Please review [OM Memorandum 08-54](#) for instructions regarding the processing of cases in light of *Grosvenor*.

2. Consider consolidating the complaint and the compliance specification. Whenever the backpay period is fixed, it is expeditious to litigate the backpay with the case on the merits. See [GC Memorandum 02-04](#) and [OM Memorandum 07-59](#).

3. Seek Interregional Assistance when necessary. A Region should promptly seek help from Operations when the Region's workload precludes the timely processing of compliance work.

4. Set a plan of action for each case and update it at least monthly. At the beginning of each month, the supervisor and compliance officer and any

others who should be involved should review all pending cases and set a plan of action.

5. Look for ways around obstacles and delays. In accord with [OM Memorandum 08-47](#), fn. 2, to reduce delays in compliance proceedings, institute a review of open compliance cases, increase the use of investigatory subpoenas in compliance cases, and file Motions for Partial Summary Judgment in compliance cases with the Administrative Law Judge, rather than the Board.

6. Evaluate cases realistically. Sometimes there is no likelihood of a meaningful recovery. The Region should take into account the realistic outcome and conserve its resources. In such cases, the Region may check with the Contempt Litigation and Compliance Branch to see if they can advise the Region of any other avenues of attack. If a case shows up repeatedly on the overage case list, there should be a discussion about how it should be handled, what resources should be sufficient, and whether the case should be closed administratively. With the concurrence of the Contempt Branch, the Region's recommendation to close any court order case short of full compliance is likely to win quick approval in Operations.

7. Take advantage of appropriate training modules and other Agency training resources

a. The relevant training modules are: [Module 3: Bankruptcy Concepts and Issues](#); [Module 4: Bankruptcy Litigation and Practice Tips](#); and [Module 18: Preparing for and Litigating Compliance Cases](#). A module on settlements is now being developed. It is also valuable to have Regional compliance experts train the full staff.

b. The Contempt Litigation and Compliance Branch and DAGC Beth Tursell in Operations can also provide expert speakers for the Regions. Training Tuesdays often feature compliance topics.

c. A useful [outline covering the essentials of calculating backpay](#), a copy of which is on the Operations page of Surfboard under Guidance/Training, Compliance Resources, and Compliance Toolbox. This comprehensive outline ensures the collection of all legitimate backpay and prevents the backpay settlement from unraveling by omissions. It is also a very clear tool for Board agents to consider the full scope of backpay.

d. An [easy program for calculating interest](#) is located on the Operations page of Surfboard under the Guidance/Training, Compliance Resources, and Compliance Toolbox links. Also available is [Bacpay26](#), a more complex program for calculating backpay, which may require more expert help.

e. [OM Memorandum 08-29 \(CH\)](#), Case Handling Instructions for Cases involving *Oil Capitol Sheet Metal*, 349 NLRB 1348 (2007), [OM Memorandum 08-54](#), *Grosvenor Orlando Associates, LTD*, 350 NLRB No. 86 and [GC](#)

[Memorandum 09-01](#), Guideline Memorandum Concerning *St. George Warehouse*, should be carefully reviewed and considered.

D. Utilize a Settlement Agreement Checklist

Substantive deficiencies with settlement agreements including, for example, a failure to provide for interest payment on backpay and an incomplete settlement stipulation that omits the details of the payment plan and disbursement of monies, are concerns that must be addressed to maintain high quality.

In order to avoid these mistakes, the Board agent who is negotiating a settlement agreement should refer to a checklist of all potential compliance issues. Some [sample forms](#) used by Regions are available on the Operations page of Surfboard under the Quality Committee Materials link. The use of a checklist will ensure that our settlement agreements are accurate and complete.

E. Ensure Accurate CATS Entries

Incorrect CATS entries with respect to processing of informal settlement agreements may skew compliance efforts. CATS entries show a large number of cases as still pending compliance with an informal settlement agreement even though the settlement agreement was approved many months, or even many years, in the past, well outside established goals for obtaining compliance and closing the case.

CATS records in many of these cases may reflect incorrect data entry, although there may be valid reasons in some instances for keeping cases open in compliance long after all compliance actions have been completed.

Regional management should adopt systems for monitoring compliance proceedings in informal settlement agreement cases to assure that compliance actions are undertaken promptly and that closing or other appropriate actions follow without delay.

In this regard, among the standard reports available in CATS is the C Cases Pending Compliance Report, which may be run to provide a list of all cases in the Region pending compliance with an informal settlement agreement, including the date of approval of the agreement. CATS Query Wizard may be used to generate reports of cases in compliance. These are easy means by which to review cases in compliance with informal settlement agreements.

F. Adhere to Uniform Settlement Standards

Uniform settlement standards regarding treatment of backpay and reviewing other issues, such as broad waivers of rights or confidentiality provisions negotiated in parties' non-Board settlements, should be carefully followed. Regions should refer to [OM Memorandum 07-27](#) and [CHM 10140](#) for

guidance on the General Counsel's standard requirements before approving withdrawal of charges based upon the parties' non-Board settlement.

With respect to settlement of all other cases before the Region, Regional Directors are authorized to accept settlements of backpay without Division of Operations-Management authorization, if, among other requirements set forth in [CHM 10592.1](#), "at least 80 percent of full backpay due" based on an "appropriate method" of computation is obtained. This minimum applies to formal compliance cases, where there has been an ALJ decision, a Board order, or a court judgment; formal settlement agreements; informal settlement agreements; and non-Board settlements or adjusted withdrawals in which a merit determination has been made.⁴⁰ If less than 80 percent is achieved in such a case or if a discriminatee is receiving more than 100 percent of backpay and interest owed, the Region must obtain e-mail or telephonic authorization from Operations. The 80 percent standard applies to the sum of net backpay plus interest on the net backpay. By contrast, adjusted withdrawals and non-Board settlements, in which a merit determination has not been made, do not require a minimum of 80 percent backpay or the approval of the Division of Operations-Management, except in situations where backpay is more than 100 percent. Non-Board settlements are governed by the standards of [Independent Stave Co.](#), 287 NLRB 740 (1987), and [Alpha Beta Co.](#), 273 NLRB 1546 (1985).

G. Document Compliance Determinations

The failure to document all of the Regional determinations that were made during the processing of a compliance case undermines the quality of the compliance efforts. These deficiencies include, for example, the insufficient documentation of the basis for calculating backpay, the failure to contain copies in the file of backpay checks that were distributed to discriminatees, and the omission of file notes documenting the rationale for the Region's having obtained Operations' approval for backpay in excess of 100 percent or for backpay less than 80 percent. In other cases, files do not contain confirmation that required compliance actions had been accomplished, such as: a) purging references to discharges from personnel files; b) providing requested information; c) scheduling bargaining sessions and actually meeting; d) providing assurances to not engage in unlawful picketing; and e) obtaining receipts or other confirmation that discriminatees had received backpay.

When disputes arise, typical compliance practice is to make an initial determination of full backpay or of other compliance requirements, identify disputed issues, and to then enter into discussion with the parties in an effort to settle them. Regional Office files should reflect not just initial determinations, but

⁴⁰ Because of the importance of Board notices, the 80 percent requirement should not be used to defeat the use of informal settlement agreements with Board notices over non-Board settlement agreements without Board notices.

the positions of the parties, proposals made during the course of settlement discussions, and all other developments leading to settlement. All relevant factors underlying acceptance by the Region of a settlement, such as the risks involved in further litigation and the agreement of discriminatees and charging party, should be clearly set forth in the file. In general, see [CHM 10590](#).

Board agents should be reminded of the importance of documenting the determination of all compliance issues that are made by the Region during the processing of a case. Documentation may become crucial in considering whether or not a respondent has fully complied or whether or not a charging party or aggrieved party has a valid basis to appeal a Region's compliance determination. To avoid overlooking any compliance requirement, Regions should consider the use of case flow or case control charts in all compliance files that would identify all compliance requirements and provide a means of recording them.

IV. REPRESENTATION CASES

Procedural errors, the improper retention of the showing of interest, and issues involving file documentation; the conduct of hearings, including hearing officers advising parties that they have no authority to grant extensions of time to file briefs, failing to develop an adequate record or maintain control of the hearing; errors in decisions and reports, and properly allocating the burden regarding supervisory status; and maintaining neutrality have been identified periodically during quality reviews.

A. Procedural Errors

Some examples of procedural errors that have occurred are:

- failure to properly store challenged ballots;
- incomplete details on election agreements or notices of election;
- improperly closing the polls after the last voter on the *Excelsior* list voted but before the scheduled closing time;
- issuance of Decisions and Directions of Election or Hearing Officer's reports with incorrect appeal language;
- recitation only of one party's contentions on objections in a Report on Objections, without including any discussion or reference to the evidence or position asserted by the other party;
- failure to include in a Report on Objections requisite language overruling certain objections or affording the right to file exceptions;

- issuance of a Report on Challenged Ballots that failed to resolve one of the determinative challenged ballots;
- issuance of a Hearing Officer's Report on Objections incorrectly recommending that a Certification of Results be issued even though a majority of ballots had been cast in favor of representation; and
- issuance of a Certification of Representative and a Notice of Bargaining Obligation even though a majority of the valid ballots had not been cast for representation.

Regions should review their case processing systems to ensure that these types of errors do not occur.

Generally, these procedural errors were likely caused by: (1) a rush in case processing to meet deadlines; and (2) insufficient familiarity with the casehandling manual and GC and Operations Memoranda. To avoid them, it is recommended that Regions appoint an R-Case Coordinator,⁴¹ who has the expertise to oversee and advise staff members on procedures and substance throughout the handling of representation cases and to conduct periodic training on pertinent casehandling instructions in the manual and in headquarters memoranda. Regions should also avoid, as much as possible, last minute case processing or decision-making which may lead to omissions and errors. Finally, Regions must ensure there are adequate layers of review to guarantee that all documents issued are accurate.

B. Improper Retention of the Showing of Interest in the File

[CHM 11034](#) states that evidence of interest in all types of petitions should be retained until the case has been closed, at which time it should be returned. The only exceptions are when there has been a Freedom of Information Act request that necessitates retention of the showing of interest until all FOIA litigation has been concluded or where the showing has been or may become the subject of litigation because of challenges to it, including in unfair labor practice proceedings.

Although the task of returning showings of interest is usually performed by support staff employees, it is suggested that the R-Case Coordinator or supervisor or manager responsible for representation case processing review drafts of letters accompanying such showings to ascertain they are addressed to the proper party and, following closure of a case, ensure that a final copy of the letter has been placed in the file. These procedures, as well as utilization and inclusion of the suggested representation case [checklist](#) should virtually eliminate

⁴¹ Obviously, the ARD or supervisor responsible for representation case management can serve in this role.

the possibility that showings of interest are not timely returned and reduce other file documentation issues.

It is noted that Regions sometimes find that they need the showing of interest in unfair labor practice cases several months after a representation case has been closed. Unfortunately, experience has shown that parties often discard it shortly after it has been returned. To avoid this problem, it is suggested that the letter accompanying the returned showing of interest ask that the showing of interest be retained for a one year period in the event it is needed in future cases.

C. File Documentation Issues

Some examples of incomplete documentation are:

- the failure to document efforts to advance the processing of petitions;
- missing or unsigned or undated Forms 4069;
- failure to record efforts to obtain stipulations prior to hearings;
- the absence of the parties' positions on significant issues and efforts to narrow the issues;
- failure to explain why hearings had been rescheduled, postponed or adjourned; unsigned Tallies of Ballots;
- the absence of reasons for Regions' decisions on the resolution of issues such as challenged ballots or decisions to impound ballots;
- issuance of a revised tally of ballots sustaining certain challenges without either a stipulation or any factual basis for doing so;
- missing documents such as Hearing Officer's Reports or Objections Reports; and
- the absence of documents indicating that showings of interest have been returned.

Throughout an investigation, the Board agent assigned to the case is required to maintain a current record of the agent's activities and contacts with the parties. [CHM 11850](#).

Every file must be self-contained and documents in the file must show how the case progressed as well as the reasons certain actions were taken. Thorough but succinct file documentation allows others to pick up the file, quickly determine the status of the case, and easily continue with the processing of the case should the original agent become unavailable. Documentation allows any reviewing official to quickly ascertain what has been done and the rationale for

taking such action and avoids the need to surmise why actions were, or were not, taken. Such documentation preserves the underlying facts and rationales for posterity and diminishes the need, if charges involving these parties are filed in the future, to speculate regarding important details. Finally, in some instances of particularly unusual or creative procedures, the documentation will serve as a teaching tool for cases raising the same or similar issues.

Supervisors must pay special attention to these issues during their review of the files and should regularly remind employees of the need for proper documentation. In addition, immediately prior to closure of representation cases, the R-Case Coordinator or other responsible supervisor or manager responsible for representation cases should review the files to ensure that they are self-contained, complete and fully documented. Several regions utilize the recommended [checklist](#) to assist agents, support staff and supervisors reviewing files in ensuring that all documents are in the files and that all important procedural steps have been taken.

D. Hearing Issues

1. Hearing Officers Stating That They Do Not Have Authority to Grant Extensions of Time for Filing of Briefs

Hearing officers stating that they do not have authority to grant more than seven days to file briefs is a continuing problem. [Section 102.67\(a\)](#) of the Rules and Regulations provides that parties automatically have seven days within which to file briefs. In addition, the hearing officer has discretion to grant an extension of time not to exceed 14 days. However, extensions should be granted only for good cause. See [CHM 11244.2](#) and [GC Memorandum 04-02](#). It remains the Agency's policy that hearing officers have discretion to grant extensions of time beyond seven days to file post-hearing briefs, but the justification for granting such an extension will be rare. Parties dissatisfied with the hearing officer's ruling on requests for an extension still have the opportunity to request additional time from the Regional Director. Regions should highlight this policy in Regional Office training sessions.

2. Failures to Develop an Adequate Record

Concerns raised about the development of an adequate record at a pre-election hearing include situations where a hearing officer accepted a stipulation without supporting facts; failed to clarify the parties' positions on supervisory status or other unit placement issues; failed to secure stipulations or evidence as to jurisdiction facts; labor organization status or contract bar; failed to ask standard questions provided in the Hearing Officer's Guide; failed to summarize the positions of the parties; and failed to ask whether petitioner desired to proceed to an election in any unit found appropriate.

The purpose of the R case hearing is to adduce record evidence so that the Board may discharge its duties under Section 9 of the Act. As such, it is non-adversarial in nature. [CHM 11181](#). It is the duty of the hearing officer to see that

a full record is developed and it is also the hearing officer's duty to keep the record as short as is commensurate with its being complete. [CHM 11188.1](#). The outline of a typical hearing is described in [CHM 11189](#) and includes a checklist. [CHM 11187.2](#) states that the hearing officer should prepare a written stipulation prior to the hearing. It includes a sample stipulation and cautions that a stipulation needs a recital of supporting facts in order to be useful. [The Guide for Hearing Officers](#) is a valuable training resource and provides comprehensive instructions and guidance for conducting hearings. It also includes a sample stipulation in [Appendix A](#). Regions should provide constructive feedback to hearing officers after decisions are prepared. Common recurring problems should be raised at a staff meeting. It is a best practice to have a meeting before the hearing in order to discuss anticipated issues. The issues discussed and decisions made should be documented in the file. Some Regions have found it useful to have a follow up discussion before the record is closed.

3. Failures to Properly Conduct and Control R Case Hearings

Concerns are occasionally raised about the failure to properly conduct and control R case hearings. Those concerns include situations where a hearing officer permitted questioning on irrelevant matters such as the showing of interest; developed a confusing record; did not ask questions to clarify shortcomings in the record; failed to have the parties state their positions on the appropriate unit; failed to set the time for filing briefs; and failed to advise the parties on the record of the consequences for failing to request an expedited copy of the transcript.

The hearing officer's role is to guide, direct and control the presentation of evidence at the hearing. [CHM 11185](#). Specific critical points to remember include:

- a) Evidence of showing of interest should never be introduced or received in evidence. [CHM 11184](#).
- b) Parties to the hearing should succinctly state on the record their positions as to the issues to be heard. [CHM 11217](#).
- c) The hearing officer's introductory remarks should advise the parties that a party's request for an extension of time to file briefs based upon a delay in receipt or non-receipt of a transcript will normally be denied, unless arrangements for expedited delivery have been made by the party. [CHM 11190.1](#).

E. Decision and Report Issues

1. Avoiding Errors in Pre-Election and Post-Election Reports and Decisions

Avoiding and catching errors in Regions' pre-election and post-election reports and decisions prior to their issuance should be a high priority. Examples

of identified errors include reports and decisions issued containing errors in case law, errors in the unit descriptions (omitted job titles) and incorrect appeal language.

To avoid such problems, Regions should maintain current boilerplate language on the shared drive to be used by agents whenever they are drafting pre-election and post-election reports and decisions. Older outdated documents should be discarded.

Regions should ensure that there are adequate levels of review for all reports and decisions prior to their issuance. While we recognize that there are time constraints that accompany issuance of these reports and decisions, adequate review and proofreading are essential to prevent embarrassing errors.

2. Properly Allocating the Burden Regarding Supervisory Status

Supervisory determinations in representation cases are often challenging and deserve special attention. In one instance, a Region found that the party asserting supervisory status had failed to meet its burden, but nevertheless voted the individual subject to challenge.⁴² Although there is always tension between the completeness of the record and the need to get to a quick election, Regions should apply the burden of proof on supervisory status in all but the most extreme circumstances.⁴³ The Board's decision in *Harborside*⁴⁴ makes it vital to determine supervisory status at the earliest possible stage of the representation process. To reach a fair, well-grounded decision, the Region should be active in preparing for and conducting the hearing.⁴⁵

While it is understandable that Regions may be reluctant to apply the burden of proof when the evidence is conclusionary or incomplete, the solution is not to vote the individual under challenge, but to develop a complete record. It is important to have in-depth discussions with the parties prior to the hearing to identify the supervisory hierarchy and the potential supervisory issues that will be presented, encourage the parties to bring the necessary witnesses with first-hand information, and bring or subpoena information to determine supervisory status. Hearing officers should not hesitate to be aggressive in questioning witnesses to

⁴² If the party with the burden of proof does not prove supervisory status, the presumption of employee status is unrebutted. See, e.g., [Quadrex Environmental Co.](#), 308 NLRB 101, 102 (1992).

⁴³ There may be instances where the number of individuals affected is relatively few in number and there is a close question about whether the burden of proof has been met that cannot be resolved without a protracted hearing.

⁴⁴ [Harborside Healthcare, Inc.](#), 343 NLRB 906 (2004) supervisory pro-union conduct may be objectionable if it reasonably tended to coerce or interfere with the exercise of free choice and materially affected the outcome of the election.

⁴⁵ If a party refuses to take a position on supervisory status, the presumption of employee status applies. [Bennett Industries, Inc.](#), 313 NLRB 1363 (1994).

ensure there is a complete record. As a last resort, the hearing officer may need to subpoena witnesses and documents. While such a procedure causes delay, the delay is much greater if the hearing must be reopened after the transcript is reviewed.

F. Ensuring the Appearance of Neutrality in Representation Cases

1. Hearing Officers

As noted above, hearing officers must sometimes become quite active during the course of a hearing. While a hearing officer is encouraged to probe equivocal or generalized testimony, that probing must not assume an adversarial aura by being hostile, argumentative, or accusatory. A balance must be struck between probative questions about seemingly conflicting or inconsistent accounts and questions that suggest judgmental assessments of those accounts. The Board agent thus must carefully craft questions, and regulate the tone and tenor of those questions, so as to secure the information but avoid the appearance of assisting or making the case for a party to the proceedings. Put another way, a hearing officer must responsibly exercise control in a hearing as opposed to dominating the hearing, the former being necessary to the orderly presentation of evidence while the latter carries the danger of appearing biased or prejudicial.

2. General Representation Casehandling

Actual neutrality in dealing with parties and gathering and considering their evidence in representation cases is not sufficient. Rather, the appearance of that neutrality must be conveyed in all contacts with the public if we are to ensure confidence in the integrity and fairness of our processes. Those appearing before us must be assured that the Agency is a forum that is committed to an objective, unbiased assessment of their positions and evidence.

The appearance of neutrality must be reflected in all communications with the parties, whether written, telephonic, or face-to-face. Discussions with parties that are brusque or accusatory present the appearance of predisposition or bias, either of which is inimical to obtaining parties' cooperation and securing all relevant evidence. Board agents must be cognizant of their tone, tenor, and demeanor. In all facets of our work, we attempt to acquire information and evidence. To be successful in that endeavor, the parties and witnesses must be persuaded that we will be fair.

Face-to-face communications perhaps pose the greatest potential for demonstrating an appearance of bias. It is incumbent on Board agents to maintain a sense of decorum, avoiding at all times a confrontational, argumentative, judgmental or aggressive style that conveys an appearance of bias. Similarly, Board agents must also avoid overly friendly conduct that suggests alignment with one party over another.